83-564

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No. _____

C. DULA HAWKINS, ET AL.

PETITIONERS

versus

JNO. McCALL COAL EXPORT CORP.

RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Hamrick and Hamrick
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Counsel for Petitioner

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United States Court of Appeals for
the Fourth Circuit

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Rutherfordton, NC 28139
704-287-3359
Counsel for Petitioner

QUESTIONS INVOLVED

1. Should this action have been dismissed by the United States District Court for the District of Maryland, at Baltimore, for failure to join necessary parties under rule 19(b) when at the time of the dismissal the following had taken place:

C. Dula Hawkins was already a party plaintiff.

J. Nat Hamrick, Jr. was already a party plaintiff.

Petersen Enterprises, Inc. and Ruben Antonio had filed motions to be joined as parties plaintiff on the 30th day of November, 1981. (app. p. 42)

And when these motions had not been heard or acted upon until the order dismissing this case was filed on the 13th of April, 1982, at which time it was declared moot. (app. p. 21)

And when the only remaining possible party Maria Florencia Villa Aulet, daugher of deceased Commodore Villa, who is a resident of Argentina.

And when there was an outstanding order joining this minor as a party plaintiff, with her mother as her guardian. (app. p. 45)

And when defendants were on the one hand attempting to dismiss because the Argentine minor was not a party plaintiff and at the same time refusing to notorize defendant, McCall's signature, (which they admit was genuine) to the crucial letter in this litigation, which letter was demanded by the Argentine Children's Court before it would approve the Argentine minor, Maria Florencia Villa Aulet's mother, Aulet Garcia de Villa's, intervention on the minor's behalf in this action.

2. Did the United States Court of Appeals for the Fourth Circuit commit error when in its order affirming the United States District Court for the District of Maryland it:

Held that the trial judge committed error by dismissing the case under rule 19(b).

And when it affirmed for a violation of rule 41 (b), when that rule had never been mentioned in any motions, briefs, arguments, or the trial court's opinion.

And when plaintiffs secured approval from the Argentine court of the joinder of the minor through her mother as guardian , after argument in the United States Court of Appeals for the Fourth Circuit, but before the decision. (App. p. 1)

And when plaintiff moved the United States Court of Appeals for the Fourth Circuit to suspend the rules for good cause and consider the ruling of the Argentine Court at which time all necessary parties plaintiff could have been joined in this action.

And when the Fourth Circuit Court of Appeals denied that motion.

And when the Fourth Circuit Court of Appeals denied plaintiffs motion for a rehearing en banc.

The following is a list of parties to this action:

J. Nat Hamrick, Jr.

C. Dula Hawkins

Ana Maria Aulet Garcia de Villa, guardian for Maria Florencia Villa Aulet

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TABLE OF AUTHORITIES

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOLKED ARE:

The plaintiffs are all residents of states other than Maryland and the defendants are residents of Maryland. Thus the original jurisdiction is based on the diversity of citizenship under 28 USC 1332.

The decisions in this case are in direct conflict with the opinion in this court in the following case. Provident Bank and Trust Company vs. Patterson 390 US 102, 19 L Ed 2d 936, 88 S Ct. 733, which holds that the equity and good conscience criteria set forth in rule 19(b) must be followed in considering a dismissal under that rule. Justice Harlan says on page 949:

> "Application of rule 19(b)'s 'equity and good conscience' test for determining whether to proceed or dismiss would doubtless have led to a contrary result below. The Court of Appeals' reasons for disregarding the rule remains to be examined."

The decision in this case is also in direct conflict with the Second Circuit in the case of Colonial Drive-In Theater, Inc.plaintiff appellant, vs. Warner

Bro. Pictures, Inc., et al., defendant appellees, Harmer Drive-In Theater, Inc. plaintiff appellant vs. Warner Bro. Pictures Inc. defendant. 252 F 2d 856 (1959).

AND the Third Circuit Court of Appeals in Dyotherm Corporation vs. Turbo Machine Co. 392 F 2d 146.

AND the Third Circuit in Lifer v. Carter 274 F 2d 815.

AND the Fifth Circuit in Grover v. Kizer Aluminum and Chemical Co. 258 F 2d 360.

AND the Fourth Circuit in McCargo v. Hedrick 545 F 2d 393 (1956).

AND Rule 17 of the Rules of the Supreme Court.

THE DECISIONS IN THIS CASE HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION. (emphasis added)

United States Court of Appeals - Opinion dated May 31, 1983 UNPUBLISHED (app. p. 11)

United States Court of Appeals- Order in respect to re-hearing - dated July 6, 1983. UNPUBLISHED (App. p. 20)

STATEMENT OF FACTS

In late 1976 J. Nat Hamrick, Jr., Ruben Antonio and Commodore Villa learned through friends in Buenos Aires that " Somisa" - " Socieded Mixdad de Siderurgica" were thinking of adding additional companies to their list of approved suppliers of coking coal for their steel operations.

Upon his return to the United States, J. Nat Hamrick, Jr. requested C. Dula Hawkins, assist him in locating additional suppliers of coal for Somisa.

While traveling through West Virginia on this mission, C. Dula Hawkins met Mr. Bill McCall, who called his cousin, Jno. McCall and made an appointment for C. Dula Hawkins to discuss the sale of coal.

Mr. Hawkins met with Mr. Jno. McCall and the result was the letter dated November 29, 1976. (app. p. 58)

Later Mr. Jno. McCall refused to furnish financial information and samples of his coal needed by "Somisa", but he never cancelled the contract.

Mr. Nemenz, an officer of McCall Coal, called

J. Nat Hamrick, Jr. and said that he understood Somisa people were in the United States and he wanted to get the Somisa deal "back on track".

J. Nat Hamrick, Jr. and C. Dula Hawkins went to McCall's office and he stated that he wanted "Mannesman", a German firm to be his registered agent and it would deal through the Hawkins-Hamrick group and he would pay the group 6% of gross sales, which was considerably more than $1.50 per ton. But he still refused to supply the necessary information - so no sales at that time.

Plaintiffs later learned that McCall had gone directly to Somisa and sold almost two million dollars worth of coal. This action was taken while the letter of November 29, 1976 was in full force and effect.

Therefore on April 1, 1980 plaintiffs filed the original complaint in this action and obtained a nondestruct order.

Thereafter extensive discovery was initiated;

508 pages in deposition of John McCall ending Sept. 15, 1980, 315 pages of Albert W. Nemenz which ended July 24, 1980 and 769 pages of Nat Hamrick, Jr. completed on August 27, 1980.

During McCall's deposition he stated that he never discussed that matter with Mannesman.

That this is not true is shown by a cable from Mannesman to Ruben Antonio and Juan Carlos Villa which reads as follows:

> FROM HANSEN NEUERBURG GMBH, RUETOENSCHEIDER STR. 3,4300
> ESSEN 1
> TELEPHONE NO. (0201) 721, TELEX NO. 857633
>
> RE: SOMISA
>
> DEAR SIR:
>
> FROM MR. JOHN MCCALL, JR., PRESIDENT OF JNO MCCALL COMPANY IN BALTIMORE, WE LEARNED THAT YOU HAVE BEEN IN TOUCH WITH HIM AND THAT YOU FORESEE CERTAIN DEFINITE POSSIBILITIES TO SUPPLY SOMISA WITH COKING COAL IN THE FUTURE. WE HAVE BEEN JNO MCCALL REPRESENTATIVE FOR ARGENTINA FOR A NUMBER OF YEARS AND HE WANTS TO PURSUE THE DIALOG WITH YOU VIA US NOW.
>
> PLEASE LET US HAVE YOUR THOUGHT ON THE PRESENT SITUATION AS WELL AS YOUR OUTLOOK TOWARDS THE NEAR FUTURE, ESPECIALLY REGARDING THE VISIT OF THE DELEGATION FROM SOMISA TO USA. WE UNDERSTAND THAT THE DELEGATION HAS ALREADY ARRIVED SO YOUR IMMEDIATE REPLY WOULD BE APPRECIATED IN ORDER TO CO-ORDINATE YOUR AND OUR FURTHER STEPS.

BEST REGARDS.

HANSEN NEUERBURG, ESSEN

857663B HNCO D

During the deposition of Mr. Nemenz, several months later, plaintiffs, to their astonishment, HEARD MR. NEMENZ TESTIFY THAT THROUGH MERE CHANCE HE HAD DESTROYED THE SOMISA FILE JUST A FEW DAYS BEFORE THIS ACTION WAS SERVED ON MCCALL.

November 3, 1980. The defendants filed a motion to dismiss alleging that plaintiffs had not joined persons that they claimed to be necessary parties- to wit- Ruben Antonio and Petersen Enterprises, Inc., and Maria Florencia Villa Aulet.

November 18, 1980, Ruben Antonio assigned all of his rights in this action to J. Nat Hamrick, Jr. and C. D. Hawkins. This assignment was filed shortly thereafter.

November 26, 1980. Roland Petersen assigned all of his rights in this action to J. Nat Hamrick, Jr. and C. D. Hawkins.

January 16, 1981. Judge Ramsey issued an order that all discovery should cease.

April 17, 1981. Plaintiffs moved to have Ms. Villa join the action as guardian of her minor daughter.(App. p.48)

April 20, 1981. Defendants moved for a partial lifing of the order of Jan. 16, 1981 to allow them to discover on consideration for the assignments.

May 28, 1981. The Court entered an order lifing the ban on discovery only to permit the defendants to resume discovery concerning consideration for the assignments.

July 3, 1981. The defendants, without notice to plaintiffs, intervened in the Children's Court in Argentina, in violation of the Court's limited discovery order, to try to prevent the joinder of the Argentine minor.

July 30, 1981. The Court, without objection from the defendants, granted plaintiffs' motion to allow Ms. Villa to join the action as a party plaintiff as guardian for her minor daughter. (App. p. 45)

July 31, 1981. The defendants requested the clerk to file the " Answers- Hearings" in Argentina and transmitted these to the clerk. These were never introduced in evidence in this cause.

November 24, 1981. A status conference was held. Plaintiffs' counsel, J. Nat Hamrick, Sr. was not notified of this conference but was telephoned and asked the Judge to give him a hearing on the Motion to Dismiss. The Judge refused but gave him fifteen (15) days from November 24, 1981 to join the necessary parties. At this time there was in existance an order joining Ms. Villa as party plaintiff. (App. p. 45)

November 30, 1981. Plaintiffs moved to add Petersen Enterprises, Inc. and Ruben Antonio as parties plaintiff and to cancel their assignments. This was done to expedite the litigation because 435 pages of discovery had already taken place on the consideration for the assignments which assignments would have been estopped to deny even without consideration. NO HEARING WAS EVER HELD AND IN THE

JUDGE'S OPINION, HE DECLARED THEM 'MOOT".

(App. p. 39) (emphasis added)

December 15, 1981. Plaintiffs moved to compel the defendant to notorize the McCall letter on which this action is based so it could be introduced in the Children's Court in Argentina. This motion was never heard nor passed on by the Judge, nor hearing held. It disposed of it in the order of dismissal by the following language:

> "Plaintiffs have not stated any reason why authentication by defendants is essintial in this case. Specifically, they have not established why an authentication by the Clerk of Court or by witnesses to the signing, options available to them since this lawsuit was filed, is inadequate. In the absence of such a showing there is no reason why the court should obligate defendants to assist plaintiffs in structuring their lawsuit."

Plaintiffs' counsel,in its motion to compel, stated that the Argentine court needed the letter to permit Ms. Villa to represent her daughter. By permitting the defendants to refuse to have the McCall letter notorized the Court assisted in preventing the approval of the joinder of the minor.

Surely the defendants should not be permitted to, on the one hand move to dismiss this action for failure to join the Argentine minor and on the other hand actively attempt to prevent plaintiffs from getting approval from the Argentine Court. Nor should defendants have been permitted to file the Argentine " Answers- Hearings" which their counsel obtained for them in the Argentine court without notice to plaintiffs - more especially when all discovery was stayed except the discovery relating to consideration for the assignments of Petersen and Antonio.

December 15, 1981. Plaintiffs filed a motion to appoint a member of the Maryland bar as guardian for the Argentine minor. This was done to protect the rights of the minor in case the court later, without the hearing requested, considered the "Argentine - Answers" and voided its joinder of the minor as a plaintiff. (Which it never did.) However, the court never voided that appointment but if it had her rights could have still been protected by the appointment of C. T. Williams, III. (There was no ruling on this motion.)

That this could have been done is shown by the following authorities:

Rule 17 (c) of the Federal Rules of Civil Procedure, which reads as follows:

> "(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." (Emphasis added)

In Slade v Louisiana Power and Light Company, 418 F. 2d 125 (1969), Justice Bell, Ainsworth and Godbold, speaking for the Court say on page 126:

> "[3] It is well settled that '*** where a guardian or other representative of a minor already has been appointed and qualified by a state court, his capacity, when he seeks to act in federal court, is tested by the law of the state in which the district court is held, but if an infant or incompetent does not have a

validly appointed state representative, the federal court in which suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law.' 2 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961), § 488. Accord: Travelers Indemity Co. v. Bengston, 231 F 3d 263 (5th Cir. 1956), aff'g 132 F. Supp. 512 (W.D. La., 1955); Fallat v Gouran, 220 F 2d 325 (3d Cir. 1955); Brimhall v. Simmons, 338 F 2d 702 (6th Cir. 1964). See also 3A Moore Federal Practice, (2d ed., 1969) ¶ 17.26:

January 13, 1982. Defendants moves the court to reconsider its order joining Ms. Villa in the lawsuit as guardian of her minor daughter. This motion was never heard - and when the case was dismissed for failure to join the Argentine minor, there was in existence and in the record an order joining her. (App. p. 45)

In a further effort to move the case to trial plaintiffs stated on the record that if they won the case, 1/5 of any recovery would go to the minor daughter of Juan Carlos Villa and if the case was lost, they would pay the costs. This would have prevented any risk to the defendants that they do not already run because even if this case is dismissed the

Argentine minor can bring suit in Maryland for her part of the loss.

In spite of all of the efforts of the plaintiff to secure formal approval of the Argentine Children's Court (which they never believed was necessary), the court declined to require the defendant to authenticate John McCall's signature so that formal approval in Argentina could be effectuated.

In its order of dismissal under rule 19(b), the court ruled that the motions of Petersen's Enterprises, Inc. and Ruben Antonio as parties plaintiff were "moot" because the Argentine minor had not been joined.

At the time of the dismissal, April 13, 1982, nothing had been done on defendants motion to reconsider the courts order making Ms. Villa a party plaintiff as guardian of her minor daugher and the order joining her is still outstanding.

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit. After briefs and arguments but before the case had been decided, plaintiffs obtained approval from the Argentine Children's Court for Ms. Villa's appearance as guardian for her daughter in this action. Plaintiffs

filed two motions to suspend the rules and to include in the appeal the authority which they had, after months and months of effort, obtained permitting the joinder of the Villa heir. (App. p. 1&5)

The United States Court of Appeals for the Fourth Circuit denied these motions and affirmed the dismissal but as previously stated said that the trial court committed error by dismissing under rule 19(b) but that they would affirm the dismissal under rule 41(b) . This in spite of the fact that 41(b) had never been mentioned in the court below, it had never been mentioned in any of the briefs and arguments presented to the United States Court of Appeals for the Fourth Circuit and plaintiffs were never given any opportunity to speak or file anything in opposition to the dismissal under rule 41 (b).

Plaintiffs filed a petition for rehearing and suggestion for rehearing en banc on the 10th day of June, 1983. This petition was denied on the 6th day of July, 1983 and plaintiffs appealed to this court.

ARGUMENT

Since the United States Court of Appeals for the fourth circuit held that it was error to dismiss this action under rule 19(b) and proceeded to affirm the order of dismissal using rule 41(b) petitioner will first address the 41 (b) dismissal.

First. The pertinent part of rule 41(b) reads as follows:

> "INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of any action or of any claim against him."

A mere glance at the civil docket sheet showing the activity in this case (app. p 60) shows that there was no failure to prosecute. In fact plaintiffs were barred from any effective prosecution of their case for fourteen (14) months as is shown by the following.

Plaintiffs filed this action on April 1, 1980. An amended complaint was filed on October 9, 1980.

Voluminous discovery, 1876 pages, took

place from the filing of the complaint until January 16, 1981, as shown by Civil Docket Sheet in 82-1402 (App. p. 60)

On January 16, 1981, nine (9) months after filing of the original complaint and three (3) months after the filing of the amendedcomplaint, Judge Ramsey entered an order staying all discovery until he ruled on the motion to dismiss. (App. p 46)

This order was entered when all persons having an interest in the litigation had either been joined or had assigned their rights to plaintiffs. And when plaintiffs were attempting the following discovery:

> Nov. 4, 1980 - Nr. 36 - Request (second) of plaintiff for Production of Documents and exhibit A
> Nov. 4, 1980 - Nr. 37- Notice of Plaintiffs to take Deposition of Dr. James F. R. Sieper and R. E. Perkinson and Request for Production of Documents.
> Nov. 4, 1980- Nr. 38 - Notice of Plaintiffs to take Deposition of Melanie Lawson and James J. Sidebotham.

Nov. 13, 1980- Nr. 39 - Notice (2) of Plaintiffs to take Deposition of the Chessie System and John S. Connor, Inc., on December 1, 1980, and Request for Production of Documents.
Nov. 13, 1980 - Nr. 40 - Notices (2) of Plaintiffs to take Depositions of Albert Knighton, John S. Connor, Inc. and Gordon Broadfoot, John S. Connor, Inc. on December 3, 1980.

On May 29, 1981, Judge Ramsey lifted the stay on discovery only to allow defendants to enquire into the consideration for the assignments (which plaintiffs felt was totally unnecessary as the assignors could never deny or disaffirm the assignments whether they were for a consideration or not) italics ours.

Thus from three months after the amended complaint until the order of dismissal, plaintiffs were barred from doing any discovery, even that already noticed.

Nevertheless, plaintiffs brought Ruben Antonio from Argentina to defendant's offices in Baltimore to be deposed regarding consideration (112 pages) and brought Roland Petersen from Florida for the

same purpose (186 pages) and J. Nat Hamrick, Jr. for the same purpose (136 pages).

During this time, counsel, J. Nat Hamrick, Sr.'s, younger son, Brown Hamrick, was having a very serious operation in connection with an automobile accident and counsel asked to continue these depositions so that he could be with his son during this time.

Subsequently it became apparent to plaintiffs appellants that the discovery regarding consideration would continue to consume considerable time which plaintiffs felt could be better used in moving the action along.

Therefore, plaintiffs, J. Nat Hamrick, Jr. and C.Dula Hawkins, spoke to their good friends, Roland Petersen and Ruben Antonio and asked them to cancel their assignments and join the action as formal parties to the end that the action could proceed. The Petersen and Antonio motion to join as parties plaintiffs was filed on Nov. 30, 1981. (App. p. 42) . This

motion was never ruled upon until the action was dismissed at which time it was declared to be "moot" because plaintiffs had not joined necessary parties (referring to the Argentine minor) At that time there was an order granting her motion to join. (App. p. 45)

Meanwhile, plaintiffs continued to request that the defendant honor their verbal agreement to notorize the McCall letter to the end that it could be send to the Children's Court in Argentina to obtain approvail of the joinder. This the defendants declined to do.

In a further effort to obtain the Argentine Courts approval of the joinder of the Argentine minor, plaintiffs filed a motion to compel the defendants to authenticate the said letter and also moved to appoint a member of a lawfirm in Maryland as guardian for the minor so that she could be represented in the United States District Court of Maryland. (Motion to Compel, app. p. 79)

Plaintiff respectfully submits that it is perfectly apparent that dismissing this case under

rule 41 (b) for failure of plaintiffs to prosecute or to comply with these rules or any order of this Court was clearly error because plaintiffs were doing everything possible to join the Argentine minor and had filed a motion to join Petersen Enterprises, Inc. and Ruben Antonio, who were the only other possible plaintiffs. The United States Court of Appeals held that the dismissal under rule 19(b) was error. Nevertheless, it affirmed relying on rule 41(b).

This ruling suberted the express purposes set forth in rule 19(b) and was in clear violation of the principles so specifically set out by this honorable court in an opinion written by Justice Harlan in the case of Provident Bank and Trust Co. v Patterson 390 US 102, 19 L Ed 2d 936, 88 S Ct 733 on page 949 of the Lawyers Edition Justice Harlan says:

> " Application of Rule 19(b)'s 'equity and good conscience' test for determining whether to proceed or dismiss would doubtless

have led to a contrary result below. The Court of Appeals' reasons for disregarding the Rule remain to be examined. "

All through this opinion it is perfectly apparent that this honorable court intended to clear up forever the question of whether or not the four criteria in rule 19(b) should be followed. They were not followed in the case and that is the reason the Court of Appeals could not affirm a dismissal under rule 19(b), the pertinent parts of rule 19(b) read as follows:

> "(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE.
>
> If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have adequate remedy if the action is dismissed for nonjoinder."

We now respectfully call the courts attention to a judgment which we proposed to the trial court which was essentially this: Plaintiffs agreed to hold 1/5 of the recovery in trust for the Argentine minor. Plaintiffs agreed to pay all costs in case the litigation was lost. If the Argentine minor in the Children's Court in Argentina accepted 1/5 of the recovery she would be estopped to come here and bring another lawsuit. If she did not accept 1/5 of the recovery the recovery could be held in trust until she no longer had a right to bring an action under this contract, at which time it could be paid to her.

If the minor did not accept 1/5 and came to the United States and sued the defendants she would have a very difficult time overcoming the doctrine of collateral estoppel. However, if she did overcome that doctrine and litigated the action the 1/5 being held in trust for her could be used to reduce the amount of any judgment that she might get against the defendants. If this had been followed everybody would have been protected and the case could have gone to trial.

We certainly think that the Court of Appeals should have allowed our motion for Suspension of the Rules and let us introduce the authority of the Argentine court given to Ms. Villa to intervene in this case as guardian for her daughter. Had they permitted the introduction of this document, and remanded the case at that time, Ms. Villa's joinder would have been approved by the Argentine courts and Ruben Antonio and Petersen Enterprises, Inc. could have been joined and all the necessary parties plaintiff would have been present in the litigation and it could have been

tried out on its merits. The failure of the Court of Appeals to do this we contend was error, because:

The dismissal of this case will not save any judicial time nor prevent the trial of the case as fully and completely as if all parties were there because the Argentine minor may still bring an action in the United States District Court for Maryland. If she does so the case will be tried and nothing will be accomplished by this dismissal except the defendants will be allowed to benefit by their own wrong (save 4/5 of any damages) in refusing to authenticate the McCall letter and obstructing the progress of this action , so that the minor's joinder could be approved by the Argentine court.

The ruling in this case is directly in contra to the decision of the United States Court of Appeals for the Second Circuit in the case of Drive-In Theater, Inc. plaintiff appellant vs. Warner Brothers Pictures Inc. defendants, appellees 252 F 2d 856. In this

case plaintiffs were faced with the delay which was occasioned in part by the defendants. The Court said on page 857:

> "Moreover, defendants must have known that their vigorous pressing of the disqualification issue including their appel to the district court's original refusal, would necessarily involve additional delay; they obviously concluded that the counsels elimination was a sufficiently necessary tactical step to justify the delay thus caused. We think that the interest of justice require that these actions be restored to the district court's docket for eventual trial and judication."

This case involved a case where a counsel was disqualified and they were attempting to get other counsel.

In this case, lead counsel resigned from the case and plaintiffs were required to rely on counsel who had had very little participation in the case up to that time.

In Dyotherm Co. vs. Turbo Machine Co. 392 F2 146 where the United States Court of Appeals for the third circuit reversed a dismissal of a case for failure to prosecute, which case had been pending

from August 29, 1962 until November 22, 1966 and the court had observed that a good bit of the delay was due to the defendants activity.

In this case very substantial delay was due to the defendants activity in insisting upon and getting a stay of discovery and then getting discvoery to go into the consideration for the assignments which consumed substantial discovery time when a lack of consideration would not have defeated the assignment.

In the following cases the court has stated a dismissal for lack of prosecution under rule 41 (b) is extremely harse. In Lifer vs. Carter 274 F 2d 815, the Court says:

> "The Court has and should have a wide discretion as to penaltics for failure of diligent prosecution in litigation. Had the Court contented itself with merely dismissing the present action without predjudice, we should not have thought it necessary to interfere. But as it stands, the plaintiffs face a permanent bar for a delay which in our congested trial courts is hardly unusual... under the circumstances the doom entered below seems all together too final and definitive we think the action should take the more normal course of pleading and disposition in ways less abrupt." (Emphasis added.)

Plaintiffs filed a petition for rehearing in the United States Court of Appeals for the Fourth Circuit with request for rehearing en banc.

The United States Court of Appeals for the Fourth Circuit denied the motion for petition for rehearing and plaintiffs appealed to this honorable court. (App. p. 20)

See also Reizakis v. Loy 490 F 2d 1132 (4th Cir. 1974)., Dugan vs. Graham 372 F 2d 130, 131 (5th Cir. 1967).

CONCLUSION

This case is a prime example of the present trend to use and abuse the rules of civil procedure to make it so difficult and expensive to finally adjudicate litigation on its merits that the primary purpose of the courts - TO ADMINISTER JUSTICE- is subverted and many times defeated. Plaintiffs here did everything in their power to expedite this litigation while defendants did everything in their power to obstruct it.

When plaintiffs finally obtained the approval of the Argentine Courts (which they felt was not necessary)

the United States Court of Appeals for the Fourth Circuit refused to amend the record to show that approval when such an amendement would have made it possible for the case to be decided on its merits. Instead, after holding that it was error to dismiss under rule 19(b), as the trial judge did, proceeded to affirm under rule 41(b) which had never even been mentioned in the trial court.

SURELY THIS IS A CASE WHERE THIS HONORABLE COURT SHOULD EXERCIZE ITS SUPERVISORY POWER TO MAKE IT CLEAR THAT THE ADMINISTRATION OF JUSTICE, NOT THE MANIPULATION OF THE RULES TO DISMISS CASES, IS THE PRIME RESPONSIBILITY OF THE COURTS OF THIS LAND. SUCH A FIRM DECISION BY THIS COURT WOULD DO MORE THAN ANYTHING ELSE TO EXPEDITE LITIGATION, CLEAR DOCKETS AND TRY CASES ON THEIR MERITS. (emphasis ours)

Respectfully submitted this the 3rd day of Oct. 1983.

J. Nat Hamrick- Hamrick and Hamrick
PO Drawer 470
Rutherfordton, NC 28139
704-287-3359
Counsel for Petitioners

ENTRY OF APPEARANCE

J. Nat Hamrick, Attorney for Petitioner, a member of the bar of this Honorable Court , does hereby enter his appearance in this Court for the purpose of representing Petitioner in this action.

J. Nat Hamrick
Hamrick and Hamrick
PO Drawer 470
Rutherfordton, NC 28139
704-287-3359

CERTIFICATE OF SERVICE

This is to certify that the undersigned, a member of the bar of this Court, served this Petition for a Writ of Certiorari and Appendix thereto upon the opposing counsel by depositing at least three copies of the Petition and three copies of the Appendix in the United States mail addressed as follows:

Morton A. Sacks, Ray Fidler
and Thomas L. Crowe
Cable, McDaniel, Bowie and Bond
900 Blaustein Building
Baltimore, Maryland 21201

This the 3rd day of October, 1983.

J. Nat Hamrick
Hamrick and Hamrick
PO Drawer 470
Rutherfordton, NC 28139
704-287-3359
Attorney for Petitioners

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Appendix To
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1402

C. DULA HAWKINS, ET AL.,

Appellants

v.

JNO. McCALL COAL EXPORT CORP., ET AL.,

Appellees

Appeal from the United States District Court for the District of Maryland

(Norman P. Ramsey, Judge)

MOTION FOR SUSPENSION OF RULES FOR A GOOD CAUSE BY ADDING TO THE RECORD ORDER OF THE CHILDREN'S COURT OF BUENOS AIRES, ARGENTINA AND BRIEF IN SUPPORT OF

J. Nat Hamrick
Hamrick & Hamrick
P.O. Drawer 470
Rutherfordton, NC
28139
704-287-3359
Counsel for Appellants

No comes J. Nat Hamrick, counsel for Appellants in the above captioned matter and moves pursuant to Rule 2 of the Federal Rules of Appellate Procedure, for a suspension of the rules for good cause shown and the addition to the record of a certified authenticated copy of the proceedings in the Children's Court in Buenos Aires, Argentina allowing Ana Maria Aulet Garcia to intervene for her minor daughter, Maria Forencia Villa Aulet, in the above captioned case. The good cause shown is as follows: The United States Court for the district of Maryland entered an Order dismissing this case for the reason that the Argentine minor should but could not be joined. (Appellants appendix page 43.)

The minor's mother, Ana Maria Aulet Garcia, had a proceeding pending in Argentina for some time seeking permission from the Argentine minor's court to

allow her to intervene in this action on behalf of her minor daughter. This order has now been entered and a certified authenticated copy is attached to this motion. However, the order was not entered at the time the case was heard in the district court of Maryland and had not been entered at the time the case was argued before this honorable court. However, since this has been accomplished and the minor's mother has been authorized to intervene in her behalf in this action the plaintiff respectfully moves the court that the order of the Argentine court be added to the record and respectfully shows to the court that when it is added to the record all necessary persons will be parties to this action.

In view of the entry of the order by the Argentine court it is respectfully submitted that the question before this court is "moot" and plaintiffs re-

spectfully suggest that the matter be sent back to the district court for trial.

This 17th day of February, 1983.

/s/ J. Nat Hamrick
J. Nat Hamrick
HAMRICK & HAMRICK
P.O. Drawer 470
Rutherfordton, NC 28139
704-287-3359

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1402

C. DULA HAWKINS, ET AL.,

APPELLANTS

V.

JNO. McCALL COAL EXPORT CORP., ET AL.,

APPELLEES

APPEAL FROM THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

(NORMAN P. RAMSEY, JUDGE)

MOTION TO AMEND APPELLANTS' MOTION FOR SUSPENSION OF RULES

I feel compelled to file this amendment because Appellees in their Response to Appellants' Motion for Suspension of Rules, state on page two, line fourteen that Appellants had taken no formal

action to join the interest of the Villa estate until September 8, 1982.

This statement is not correct, as counsel for Appellees undoubtedly knew, because prior to December 21, 1981 their retained counsel, Dr. Manual J. F. Ordonez, in Argentina was present in the Argentine courts attempting to prevent the joinder while counsel for the Appellees were present in the United States District Court for the District of Maryland insisting that the joinder was necessary and if it was not accomplished that the case should be dismissed. This is shown by a letter directed to counsel for Appellants by Ana Maria Aulet Garcia, mother of the minor, dated December 21, 1981 (Exhibit A) stating that Dr. Ordonez (McCall lawyer) was present in the court before that time attempting to prevent her joinder. This letter on paragraph five also shows that she needed a legaliza-

tion of the McCall letter which counsel for Appellees had refused to have notorized and which counsel for Appellants had moved the Court for an order compelling them to have said letter notorized. (to the end that it could be sent to the Argentine Court) (Appellees Appendix page 77). Exhibit B is a letter addressed to the counsel for Appellants from Ana Maria Aulet Garcia dated September 2, 1981 which states that she had had a consultation with the assessor of minors asking to represent her daughter. A letter from Ana Maria Aulet Garcia to counsel for Appellants dated October 7, 1981 (Exhibit C) saying that she had placed before the assessor of minors the request to intervene, which letter also says she needs a certified copy of the McCall contract.

I must call the court's attention to the last paragraph of her letter dated

December 21, 1981 which reads as follows: "This would have been possible much sooner but for the case against it mounted by Dr. Ordonez which prejudiced my case."

Respectfully submitted.

March 21, 1983.

/s/ J. Nat Hamrick
J. Nat Hamrick
HAMRICK & HAMRICK
P.O. Drawer 470
Rutherfordton, NC 28139
704-287-3359
attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 1983, two copies of the foregoing Appellant's Motion to Amend Appellants' Motion for Suspension of Rules were mailed, postage prepaid, to Cable, McDaniel, Bowie and Bond, 900 Blaustein Building, One North Charles Street, Baltimore, Maryland 21201, attorney for Appellees.

/s/ J. Nat Hamrick
J. Nat Hamrick

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1042

C. Dula Hawkins, Jr. Nat Hamrick, Jr., Ana Marie Aulet Garcia de Villa, guardian for Maria Florencia Villa Aulet, Appellants,

versus

JNO McCall Coal Export Corporation, JNO McCall Coal Company, Inc., Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Upon consideration of appellants' motion to expand the record;

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge

Hall and Judge Murnaghan.

FOR THE COURT,

William K. Slate, II
Clerk

F I L E D
April 11 1983

U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEAL
for the FourthCircuit

No. 82-1402

C. Dula Hawkins, Jr. Nat Hamrick, Jr., Ana Marie Aulet Garcia de Villa, guardian for Maria Florencia Villa Aulet, Appellants,

v.

JNO McCall Coal Export Corporation, JNO McCall Coal Company, Inc., Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Argued: January 13, 1983

Decided: May 31, 1983

Before HALL, MARGAGHAN and SPROUSE, Circuit Judges.

J. Nat Hamrick (Hamrick & Hamrick; Andrew J. Graham, Kramon & Graham, P.A. on brief) for Appellants; Ray R. Fidler (Morton A. Sacks, Thomas L. Crowe, Cable, McDaniel, Bowie & Bond on Brief) for Appellees.

PER CURIAM:

C. Dula Hawkins and J. Nat Hamrick, Jr. (the plaintiffs) appeal from the district court's dismissal of their contract action against JNO McCall COal Export Corporation and JNO McCall Coal Company (McCall). The district court's dismissal erroneously was based on Federal Rule Civil Procedure 19(b). Since, however, the dismissal properly could have been grounded on Federal Rule Civil Procedure 41(b), we affirm.

The complaint below alleged an oral contract in which McCall promised to use the services of a five-person joint venture (which included the plaintiffs) to sell coal to a government-owned steelmaking corporation in Argentina. The complaint further alleged that McCall violated the contract and sold coal directly to the Argentine company, failing to pay plaintiffs' their commissions. This appeal,

however, involves procedural issues, rather than substantive contract issues.

The five members of the joint venture included the plaintiffs, Petersen Enterprises, Inc., Ruben Antonio and Juan Carlos Villa. Villa, an Argentine citizen, died prior to the commencement of this action and his sole heir was a minor daughter, Maria, who is also a citizen of Argentina. The plaintiffs did not refer to these other members in either their original or amended complaint. After depositions revealed their participation, however, McCall moved for a Rule 19 dismissal, asserting that all five members were necessary and indispensible parties. McCall moved, in the alternative, for an order requiring plaintiffs to join the absent join venturers. The plaintiffs thereafter secure assignments from Antonio and Petersen of their interests in the joint venture.

On December 15, 1980, the district

court gave the plaintiffs 45 days either to secure an assignment from the Villa heir or to join her. The court subsequently granted two extensions of its order upon assurances from the plaintiffs that they would comply with it. The court granted the second extension after plaintiffs' counsel stated in a letter to the court that an assignment of the Villa interest had been executed and would be forthcoming. The plaintiffs, however, never filed such an agreement.

On September 17, 1981, the plaintiffs moved to add Maria Villa's mother as a party plaintiff. The motion asserted that the mother "is the legal guardian of Mr. Villa's minor daughter. The has appointed the undersigned to represent in this litigation whatever interests in the litigation of the late Mr. Villa had." The plaintiffs filed with this motion a copy of the alleged appointment, pur-

portedly signed by Mrs. Villa. On July 31, 1981, however, McCall filed authenticated documents from Argentina which revealed that (1) Villa's widow had not authorized anyone to represent the interests of the Villa estate in the litigation, and (2) such authorization required approval from the appropriate Argentine court. Subsequently, plaintiffs' then lead counsel. Robert Seefried, withdrew as counsel and plaintiffs' current counsel, J. Nat Hamrick, Sr., assumed the role of lead counsel.

At a status conference held on November 24, 1981, the district court advised the plaintiffs that their failure to join the necessary parties[1/] had caused undue delay. The court nevertheless

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1/ In addition to Villa's heir, these parties included Antonio and Petersen, who by November 1981, had rescinded their assignments. Plaintiffs then moved the court to join Antonio and Petersen as party plaintiffs. The court denied this motion as moot in its dismissal order.

allowed plaintiffs an additional fifteen days to effect appropriate joinder. The court twice extended this deadline. During that period, the plaintiffs moved the court to appoint an associate in the law firm of plaintiffs' local counsel as guardian ad litem for Villa's heir, to act as a representative party plaintiff. The plaintiffs also filed a motion seeking to compel the president of McCall to authenticate a letter allegedly necessary to assert joinder of the representative of the Villa interest.

The district court denied these motions and dismissed the entire complaint on April 12, 1982. In its dismissal order, the court stated that the Villa heir was an indispensible party. It further found that her joinder was not feasible, principally because the court lacked in personam jurisdiction over her. The court then weighed the factors mandated by Rule 19(b)

and in exercie of its discretion granted McCall's motion to dismiss.

We think the district court incorrectly assumed that it did not have in personam jurisdiction over the Villa heir. The Maryland long-arm statute provides the requisite basis for in personam jurisdiction under the facts of this case. Md. Cts. & Jud. Proc. Code Ann. § 6-103 (b)(1) (Rep. Vol. 1980). See also Md. R.P. 107(a)(4) (Rep. Vol. 1977); Fed. R. Civ. P. 4(3), (i)(1).

Although, as we have indicated, joinder was feasible, the plaintiffs failed to comply with the court's order to effect joinder for a period of fifteen months. This failure provided the court with adequate grounds to dismiss the complaint under Federal Rule Civil Procedure 41(b). That rule provides in pertinent part: "For failure of the plaintiff to prosecute or to comply with these rules

or any order of court, a defendant may move for dismissal of an action or of any claim against him." The failure of a plaintiff to join a party after the court rules that it is an indispensible party may result in dismissal of the plaintiffs' action for failure to prosecute under Rule 41(b). See English v. Seaboard Coast Line Railroad Co., 465 F.2D 43, 47-48 (5th Cir. 1972); Transit Casualty Co. v. Security Trust Co., 396 F.2d 803 (5th Cir. 1968). The district court had more than ample reason to find a failure to prosecute under the facts of this case. In addition to the inordinate delay, the district court was misled by the assurance of plaintiffs' counsel that an assignment from Villa's estate had been procured and by the subsequent misrepresentation to the court that Mrs. Villa authorized counsel to represent the Villa interests in the case.

We have reviewed plaintiffs' other two assignments of error and find no merit in them. The judgement of the district court therefore is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1402

C. Dula Hawkins, et al,

Appellants,

versus

JNO McCall Coal Export Corporation, et al,

Appellees.

O R D E R

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Hall, Judge Murnaghan, and Judge Sprouse.

FOR THE COURT,

FILED
JULY 6, 1983
U.S. Court of Appeals
Fourth Circuit

/e/ William K. Slate
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ET AL., Plaintiffs,	)	CIVIL ACTION NO. R-80-774
v.	)	
JNO. MCCALL COAL EXPORT CORP. ET AL., Defendants.	)	

MEMORANDUM AND ORDER

This suit arises out of an alleged breach of a verbal agreement by five members of a joint venture or partnership -- two of whom are plaintiffs, C. Dula Hawkins ("Hawkins") and J. Nat Hamrick, Jr. ("Hamrick") -- and defendants. The venture allegedly was in connection with certain proposed coal transactions. Although the amended complaint contains three counts, the same transaction is common to each count. In November, 1980, defendants filed a motion to dismiss the amended complaint

for failure to join necessary and indispensible parties, namely Petersen Enterprises, Inc. ("Petersen"), Ruben Antonio ("Antonio"), and the representative of the estate of one of the deceased venturers, Juan Carlos Villa ("Villa"). Plaintiffs purportedly secured assignments from Antonio and Petersen and at the hearing held on December 15, 1980, the Court reserved ruling and afforded plaintiffs a period of forty-five (45) days in which to secure an assignment from the successor to the Villa interest. This period was twice extended at plaintiffs' request, the second extension coming after plaintiff Hamrick informed counsel that the assignment had in fact been executed and was in the mail. On April 20, 1981, a motion to add Villa's widow (Ana Maria Aultet Garcia) as a party plaintiff was filed, but on July 31, 1981, authenticated documents from Argentina were filed which revealed that (1) Villa's widow

had not inherited his estate -- a minor daughter (Maria Florencia Villa de Aulet) -- being the apparent beneficiary, (2) Villa's widow had not given her authorization for anyone to represent the interests of the Villa estate in this litigation, and (3) judicial approval for any such authorization from the Argentine court would be required. Subsequently, plaintiffs' then lead counsel, Robert Seefried, withdrew this appearance and that plaintiffs' current counsel, J. Nat Hamrick, Sr., was entered.

In September and October, 1981, Antonio and Roland Petersen were deposed at which time they informed counsel for defendants that the assignments of their interests had been rescinded and they intended to join as parties plaintiff. At the status conference held on November 24, 1981, the Court expressed the view that plaintiffs failure to accomplish joinder of the necessary parties had occasioned

undue delay in this case. Plaintiffs were nevertheless allowed fifteen days to achieve the joinder they believed necessary. On November 30, 1981, a motion to join Petersen and Antonio as parties-plaintiff was filed. The Court indicated that it would not rule on the motion for joinder until plaintiffs had accomplished the joinder of all necessary parties. At the request of counsel for plaintiffs, the fifteen day dealine for obtaining complete joinder was twice extended. As of this date plaintiffs have not moved to join the representative of the Villa estate as a party plaintiff. Plaintiffs have, however, filed other motions in its stead; which motions now have been fully briefed by plaintiffs and defendants. Currently open and ready for decision are the following motions:

1. Defendants Motion to Dismiss Amended Complaint for Failure to Join Necessary and Indispensible Parties.

2. Plaintiffs' Motion to Add Additional Parties Plaintiff.

3. Plaintiffs' Motion to Appoint Guardian.

4. Plaintiffs' Motion to Compel Authentication of Document.

The Court rules pursuant to Local Rule 6 seeing no need for further argument.

The initial question is whether the representative of the Villa estate is an indispensible party under F.R.Civ.P. 19.[1/] The starting point of this inquiry is Rule 19(a) -- "Persons to be Joined if Feasible." Under that rule, the Court must, as a threshold determination, decdide whether joinder would be desirable for a just adjudication of the action.

Without deciding the precise legal status of the status of the plaintiffs'

1/ Plaintiffs having filed a motion to join Petersen Enterprises, Inc. and Ruben Antonio as parties plaintiff, the only interest of plaintiffs' negotiating group unrepresented is that of the late Juan Carlos Villa.

business group, it is clear that the five members of the group were engaged in a joint venture for profit, each to share equally in any and all commissions of the venture. In contract actions in federal court "(j"oint obligees...usually have been held indispensible parties and their nonjoinder has led to a dismissal of the action." 7 Wright & Miller, Federal Practice and Procedure §1613 at p. 126 (1972). See, e.g., Harrell & Sumner Contracting Co. v. Peabody Peterson Co., 546 F2d 1227 (5th Cir. 1977); Republic Realty Mortgate Corp. v. Eagson Corp., 68 F.R.D. 218 (E.D. Pa. 1975). Moreover, in their brief in opposition to defendants' motion to dismiss, filed January 14, 1982, plaintiffs' now appear to concede that each of the living members of the group and the representative of the Villa interest, are parties who should be joined to this lawsuit. It is clear, therefore, that joinder of each

member of plaintiffs' group or their successor in interest, is desirable in this case.

Under Rule 19(a), if a person who should be joined hasnot been joined and his joinder is feasible, the court shall order that he be made a party. Petersen and Antonio have moved to join as plaintiffs in this lawsuit, therefore, an order by the Court that Petersen and Antonio be made parties is unnecessary. As to the representative of the Villa estate, however, such an order would be appropriate if joinder is feasible.

It is apparent that joinder of Villa's successor in interest, his minor daughter, Maria Florencia Villa de Aulet ("Maria"), it not feasible. Maria currently resides in Argentina, beyond the process and jurisdiction of this Court. Moreover, plaintiffs have been given a reasonable opportunity to add her as a party, having been

given numerous extentions of time based on counsel's representations to the Court that joinder was imminent.

In an effort to make joinder of the Villa interest feasible, plaintiffs have moved to appoint an associate of their local counsel, C. Thomas Williamson, III, as the guardian ad litem to act for Maria to the end that he may intervene in this action in a representative capacity as a party plaintiff. Plaintiffs argue that since the Court has the power to make a recalcitrant potential plaintiff an involuntary plaintiff, when that person is beyond the jurisdiction of the Court, it has the power to appoint a guardian ad litem for a non-resident minor who has a cause of action in this Court.

Plaintiffs' theory is fatally flawed in several respects. TFirst, there has been no determination that if Villa were still alive, the Court would make him an

involuntary plaintiff "in a proper case." The typical application of this procedure has been to allow exclusive licensees of patents and copyrights to make the owner of the monopoly an involuntary plaintiff in infringement suits. Wright & Miller, supra at §1606. Although the involuntary plaintiff doctrine has been applied by some courts to join persons other than exclusive licensees of patents or copyrights, the Court is satisfied that the instant action does not present a proper case for its application. See Rosen v. Rex Amusement Co., 14 F.R.D. 75 (D.D.C. 1952). As the Court of Appeals for the Fifth Circuit noted in Eikel v. State Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973), "(t)he 'proper case' is meant to cover only those instances where the absent party has either a duty to allow the plaintiff to use his name in the action or some sort of an obligation to join plaintiff in the action."

Second, plaintiffs' motion completely ignores the Court's lack of in personam jurisdiction over Maria and the concomitant lack of power to appoint a guardian ad litem to act for her in this lawsuit. See Tryforos v. Icarian Development Co., S.A., 518 F.2d 1258 (7th Cir. 1975), cert. denied, 423 U.S. 1091 (1976).

Third, under Maryland law, to which this Court looks under Rule 17(b) to determine the capacity of guardians to sue for minors, see Vroon v. Templin, 278 F. 2d 345 (4th Cir. 1960), a guardian ad litem typically will not be appointed (in the absence of conflicting interest) when a general guardian already exists. See generally Gradman v. Gradman, 182 Md. 293, 303 (1943). F.R.Civ.P. 17(c) similarly conditions the appointment of a guardian ad litem on the absence of a general guardian. Sra. Aulet Garcia de Villa, as the surviving parent, is Maria's

general guardian under Maryland law. Md. Ann. Code, Art. 72A, §1. Moreover, in their motion to add an additional party as plaintiff filed on April 20, 1981, plaintiffs represented to the Court that Sra. Aulet Garcia de Villa had been appointed guardian of her daughter by an Argentine court. Plaintiffs' motion for appointment of a guardian ad litem will be denied.

In a further effort to make joinder of the Villa interest feasible, plaintiffs have moved for an order compelling John McCall, Jr. to acknowledge his signature before a notary public. Plaintiffs argue that such acknowledgement and authentication by the Argentine Consul is required by a children's court in Buenos Aires, Argentina before an order by that court permitting the minor daughter to appear through her mother as a plaintiff in this action will be entered. Defendants concede the authenticity of the letter in question, but

refuse to assume any burden regarding establishment of its authenticity.

Plaintiffs have not stated any reason why authentication by defendants is essential in this case. Specifically, they have not established why an authentication by the Clerk of the Court or by witnesses to the signing, options available to them since this lawsuit was filed, is inadequate. In the absence of such a showing there is no reason why the court should obligate defendants to assist plaintiffs in structuring their lawsuit.

Notwithstanding the fact that the representative of the Villa estates is a party that cannot be feasibly joined, plaintiffs argue that this suit should be allowed to proceed under Rule 19(b):

> (b) Determination by Court whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or

> should be dismissed, the absent person being thus regarded as indispensible. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In discussing the first factor -- the extent to which a judgment entered in the person's absence might be prejudicial to him or those already parties -- and the second factor -- the extent to which prejudice can be lessened by protective provisions in the judgment -- plaintiffs propose the following: (1) plaintiffs will ask the Court to hold in trust one-fifth of any recovery for the benefit of the successor to the Villa interest and in the event the action does not result in a judgment favorable to plaintiffs the successor to the Villa interest will

be protected from any risk or loss as a result of this action; and (2) neither the widow of Villa nor his minor daughter have any knowledge of these transactions and the persons having such knowledge are parties or have asked to be made parties.

Without commenting on the protection plaintiffs' position afford to the holder of the Villa interest, it is clear that plaintiffs' proposal completely overlooks the prejudice that might result to defendants. As Professors Wright and Miller have notes, the emphasis on prejudice entails

> both the need to protect absent persons from litigation that might adversely affect their interests in the subject matter of the action and the need to protect those who are parties from the threat of multiple actions, which would involve additional expense to the litigants and to the judicial system, and would increase the possibility of inconsistent determinations,

Wright & Miller, supra at § 1608, p. 67. Similarly, in Potomac Electric Power Co.

v. Babcock & Wilcox Co., 54 F.R.D.486, 492 (D. Md. 1972), in granting defendants' motion to dismiss for lack of joinder of indispensible parties, Judge Harvey observed that "there is at the present time a risk that the (absent parties) could re-litigate the issues prosecuted here, or at a very minimum, require the defendants to come into another court and prove that principles of res judicata or collateral estoppel did apply in any subsequent action." The same risks are present in this case, yet plaintiffs' "solution" provides no adequate protection. Moreover, the representative of the Villa estate being beyond the jurisdictional reach of this Court, this is not a case where defendants would be in a position to bring in absent persons who could not be joined as original parties by means of defensive interpleader, or by using interpleader of asserting a counterclain under Rule 13(h)

that falls within the ancillary jurisdiction of the Court. Wright & Miller, supra at § 1608, pp.74-75; see B. L. Schrader, Inc. v. Anderson Lumber Co., 257 F. Supp. 794 (D Md. 1966); MacBryde v. Burnett, 41 F. Supp. 661 (D Md. 1941).

With respect to the third factor -- whether a judgment rendered in the person's absence will be adequate -- the Court will assume, without deciding that any judgment rendered in the absence of the representative of the Villa estate would be adequate under the protective provisions proposed by plaintiffs.

As to the fourth factor -- whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder -- plaintiffs argue that if this case is dismissed they will have no adequate remedy anywhere for the recovery of damages against defendants, since service of defendants can only be obtained in the State of

Maryland. Assuming plaintiffs' position is correct, [2/] when a group of joint venturers of diverse nationalities attempt to enter a contract for the sale of products in international commerce, one of the assume hazards associated in such a relationship is that an action against the party obligated to the joint venture may not be maintained without joinder of all interested parties. See Rosen v. Rex Amusement Co., supra, 14 F.R.D. at 76. Plaintiffs voluntarily entered into this alleged business transaction and they cannot be heard to complain that one of the consequences of this course of dealing works a harsh result on them.

In determining whether "in equity

[2/] The Court seriously doubts that service of companies shipping coal in interstate and international commerce, as plaintiffs allege, can only be obtained in Maryland. Furthermore, it is possible that plaintiffs' claims are cognizable in the courts of Argentina or some other forum.

and good conscience; an action should proceed in the absence of a party who should but cannot be joined, the Supreme Court has commented that "(t)he decision whether to dismiss (i.e., the decision whether the person missing is 'indispensible') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968). Having weighed the Rule 19(b) factors and the other pragmatic considerations present in this case, the Court concludes that it cannot in equity and good conscience allow this action to proceed among the parties before it. Defendants' motion to dismiss will be granted. Since the proposed joinder of Petersen and Antonio will not achieve the complete joinder required

in this case, plaintiffs' motion to join Petersen and Antonio as parties plaintiff will be delared moot.

For the reasons stated herein, it is this 12th day of April, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion for appointment of a guardian ad litem is DENIED:
2. That plaintiffs' motion to compel authentication of a document is DENIED:
3. That defendant's motion to dismiss is GRANTED;
4. That plaintiffs' motion to add additional parties plaintiff is declared MOOT; and
5. That the Clerk will mail copies of the Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey

Norman P. Ramsey
UNITED STATES DISTRICT
JUDGE

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. Dula Hawkins, et al. Plaintiffs vs. JNO. McCall Coal Export Corp. Et Al. Defendants.	)	Civil Action No. R- 80- 774

JUDGMENT

In accordance with the Memorandum and Order dated April 12, 1982, and filed in the above-entitled case, it is this 12th day of April , 1982.

ORDER AND ADJUDGED,

That judgment is entered in favor of defendants and against plaintiffs.

/s/ Norman P. Ramsey
Norman P. Ramsey

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ETC. Plaintiffs V. JNO. MCCALL COAL EXPORT CORP., ET AL., Defendants.	Civil Action No. R-80-774

PLAINTIFF'S MOTION TO ADD ADDITIONAL PARTIES PLAINTIFF

Plaintiffs, through their undersigned counsel, hereby move this Court, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure for an order granting permission to add Peterson Enterprises, Inc. and Ruben Antonio as parties plaintiff to this litigation.

The reasons in support of this motion are as follows:

1. Peterson Enterprises, Inc. and Ruben Antonio were participants in the effort of plaintiffs Hawkins, Hamrick and Juan Carlos Villa to secure shipments

from defendants of metallurgical coal to Somisa in Argentina.

2. Peterson Enterprises, Inc. and Ruben Antonio have previously assigned their interest in the McCall contract to plaintiff J. Nat Hamrick, Jr.

3. Defendants have raised questions about those assignments and this has resulted in a substantial delay of this litigation.

4. In order to expedite this litigation and to remove any questions about whether or not all necessary and proper parties are before this Court, Peterson Enterprises, Inc., Ruben Antonio, and J. Nat Hamrick, Jr. have agreed to terminate the assignments which exist between them and Peterson Enterprises, Inc. and Ruben Antonio desire to join this action as parties plaintiff.

WHEREFORE, Ruben Antonio and

Peterson Enterprises, Inc., through their counsel, hereby move that they be allowed to join this action as parties plaintiff.

/s/ J. Nat Hamrick
J. Nat Hamrick
HAMRICK & HAMRICK
P.O. Drawer 470
Rutherfordton, NC 28139

/s/ Andrew Jay Graham
Andrew Jay Graham
KRAMON & GRAHAM, P.A.
Sun Life Building
Charles Center
Baltimore, MD 21201
(301) 752-6030

Attorneys for plaintiffs and Ruben Antonio and Peterson Enterprises, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ET AL., Plaintiffs	)	
V.	)	Civil Action No. R-80-774
JNO. MCCALL COAL EXPORT CORP ET AL., Defendants	)	

ORDER

Upon consideration of the motion by plaintiffs to add Ana Maria Aulet Garcia de Villa, guardian for Maria Florencia Villa Aulet, as a party plaintiff to this litigation, it is this 30th day of July 1981, ORDERED that the motion be, and the same hereby is, GRANTED.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS	*	
J. NAT HAMRICK, JR.	*	
Plaintiffs	*	
	*	
v.	*	
	*	Civil
JNO. MCCALL COAL EXPORT CORP.	*	Action
JNO. MCCALL COAL COMPANY, INC.	*	No.
Defendants	*	R-80-774
	*	

****

ORDER

In accordance with the views expressed from the bench at the hearing held in this case on December 15, 1980, it is, this 28th day of May, 1981, by the United States District Court for the District of Maryland.

ORDERED, that the stay on all discovery imposed by Order of this Court on January 16, 1981, is hereby partially lifted to permit defendants to resume discovery concerning assignments of rights in this litigation. This limited discovery shall be completed within 60 days of the date of this Order. If,

however, additional time is needed by reason of problems caused by witnesses who are located outside the United States, counsel shall petition the Court for an extension of time. In all other respects, the stay of discovery is continued pending resolution of the defendants' motion to dismiss.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ET AL., PLAINTIFFS,	)	
V.	)	Civil Action No. R-80-774
JNO. MCCALL COAL EXPORT CORP, ET. AL., DEFENDANTS.	)	

PLAINTIFFS' MOTION TO ADD
ADDITIONAL PARTY AS PLAINTIFF

Plaintiffs, through their undersigned counsel, hereby move this Court, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, for an order granting permission to add Ana Maria Aulet Garcia de Villa, guardian for Marie Florencia Villa Aulet, as a party plaintiff to this litigation.

The reasons in support of this motion are as follows:

1. Juan Carlos Villa, a participant in the effort of plaintiffs Hawkins and Hamrick to secure shipments from defendants of metallurgical coal to

Somisa in Argentina, died in 1979.

2. Mr. Villa's daughter, Maria Florence Villa Aulet, is a minor and the sole heir of Mr. Villa's estate and entitled to share in whatever recovery may eventually be obtained by plaintiffs in this litigation.

3. Counsel for plaintiffs has been informed that Mr. Villa's former wife, Ana Maria Aulet Garcia de Villa, Sevilla 2940, 1425 Buenos Aires, Republic of Argentina, is the legal guardian of Mr. Villa's minor daughter. She has appointed the undersigned to represent in this litigation whatever interests in the litigation the late Mr. Villa had.

4. Thomas L. Crowe, counsel for defendants advises that he has no objection to this motion at this time.

For the foregoing reasons, plaintiffs respectfully request that the

motion be granted. A proposed order is attached.

Respectfully submitted.

/s/ Robert A. Seefried
Robert A. Seefried
SEYMOUR & DUDLEY, CHARTERED
1901 L Street, NW
Suite 200
Washington, DC 20036
Counsel for Plaintiffs

April 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS,	*	
	*	
AND	*	
	*	
J. NAT HAMRICK, JR.	*	
	*	
Plaintiffs	*	
	*	Civil
v.	*	Action
	*	No.
JNO. MCCALL COAL EXPORT CORP.	*	K-80-774
	*	
AND	*	
	*	
JNO. MCCALL COAL CO., INC.	*	
	*	
Defendants.	*	
	*	

****

DEFENDANTS' MOTION FOR STAY OF GENERAL DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS

Come NOW the Defendants, Jno. McCall Coal Export, Corp. and Jno. McCall Coal Company, Inc., through counsel, Cable, McDaniel, Bowie & Bond, Morton A. Sacks and Thomas L. Crowe, and move pursuant to Rule 8 of the Rules of the United States District Court for the District of Maryland, that pending

decision on the "Defendants' Motion to Dismiss Amended Complaint for Failure to Join Necessary and Indispensable Parties: ("Motion to Dismiss") all discovery be stayed except that which relates to the Motion to Dismiss. In support of this Motion, Defendants aver:

1. On November 3, 1980, Defendants filed their Motion to Dismiss, requesting that the Court dismiss Plaintiffs' Amended Complaint for failure to join necessary or indispensable parties or, in the alternative, that they be required to secure joinder of such parties.

2. At oral argument upon Defendants' Motion to Dismiss on December 15, 1980, the Court afforded Plaintiffs forty-five days or, until January 29, 1980, in which to secure an assignment from the successor in interest, under Argentine Law, of any interest the late Juan

Carlos Villa may have had in this litigation between Plaintiffs and Defendants, assignments previously having been obtained from one Ruben Antonio and one Roland Petersen, each of whom has had a relation to and interest in this litigation similar to that of the late Juan Carlos Villa.

3. At oral argument the Court indicated that if an assignment from Juan Carlos Villa was secured, or when it became apparent one could not be secured, the Court would after affording the Defendants discovery into the validity of any assignments secured by the Plaintiffs, rule upon the Defendants' Motion to Dismiss.

4. At the oral argument the Court also stated it would amend the Scheduling Order previously entered on September 18, 1980 to provide additional time for the parties to complete discovery because of the additional time required to

resolve Defendants' Motion to Dismiss.

5. Defendants have filed concurrently with this Motion, "Defendants' First Set of Interrogatories to Plaintiffs", and "Defendants' First Request for Production of Documents", which discovery is limited to the issue of the regularity under Rule 19 of the Federal Rules of Civil Procedure, of the assignments previously received by Plaintiffs from Messrs. Antonio and Petersen and the anticipated assignment from the successors in interest of the late Juan Carlos Villa.

6. Plaintiffs have filed "Plaintiffs' Second Request for Documents from Defendants", to which Defendants filed their Responses and Objections on December 3, 1980, but under which Plaintiffs have not yet inspected documents.

7. Defendants have noticed depositions of Dr James F. R. Sieper and

R. E. Perkinson, officers and employees of one of both of Defendants, and of third parties, the Chessie System, John S. Connor, Inc., Albert Knighton and Gordon Broadfoot, but none of said depositions has been taken, no dates having been set in some instances, and the depositions having been postponed in others.

8. Production of the documents which Defendants have agreed to produce if this case goes forward and attendance at the depositions will require additional time and expense on the part of the Defendants, which efforts and expenditures would otherwise be unnecessary if the assignments already secured are ineffective for the purpose of resisting Defendants' Motion to Dismiss or if no proper assignment of the decedent's partnership interest is acquired from the estate of Juan Carlos Villa. Moreover, such production and depositions will involve the otherwise

unnecessary disclosure of confidential material to persons who have claimed an ability to secure coal orders from one of Defendants' customers, to wit, Somisa, and who are therefore potential competitors or agents of such potential customers.

WHEREFORE, for the reasons stated above, the Court should order that, pending resolution of Defendants' Motion to Dismiss, all discovery be stayed except for discovery relevant to the Motion to Dismiss, such as "Defendants' First Set of Interrogatories to Plaintiffs'" and "Defendants' First Request for Production of Documents".

Respectfully submitted,

CABLE, MCDANIEL, BOWIE & BOND

By /s/ Morton A. Sacks
Morton A. Sacks

/s/ Thomas L. Crowe
Thomas L. Crowe
900 Blaustein Building
Baltimore, Maryland 21201
(301) 752-3650
Attorney for Defendants

POINTS AND AUTHORITIES

Rule 6(b), Federal Rules of Civil Procedure.

Rule 8, Rules of the United States District Court for the District of Maryland.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 31st day of December, 1980, copies of the foregoing Defendants' Motion for Stay of General Discovery Pending Resolution of Motion to Dismiss and the proposed Order were mailed, postage prepaid to, Robert A. Seefried, Esquire, 1901 L. Street, NW, Suite 200, Washington, DC 20036 and Andrew Jay Graham, Esquire, Sun Life Building, Charles Center, Baltimore, Maryland 21201, Attorneys for Plaintiffs.

/s/ Thomas L. Crowe
Thomas L. Crowe

JNO. McCALL

COAL EXPORT CORP.

6177 Moravia Park Drive,
P.O. Box 9696
Baltimore, Maryland 21201

November 29, 1976

Mr. C. D. Hawkins
Box 1088
Marion, North Carolina 28752

Dear Mr. Hawkins:

We understand that you are in a position to secure some metalurgical coal export business through your various associates, and that these shipments would be for the Somisa steel group in Argentina (Sociedad Mixdad de Siderurgica).

Per our agreement today, any shipments made by this company or any of its associated companies to you or to your group, we will pay a commission of $1.50 a gross ton. Said payment to be made to you or your designee within twenty-four hours after we receive full payment. We further agree that as long as you or your group continues the sale of our coals to Argentina we will not solicit direct business from Somisa.

It is understood that all terms and conditions of sales will be set by this company. If within a period of nine months you are unable to secure an order, this agreement may be cancelled by either

party.

Verytruly yours,

JNO. MCCALL COAL EXPORT CORPORATION

/s/ John M. McCall, Jr.
President

JMM/sr

Date 1980	NR	
Apr. 1	1	Complaint.
" "	2	Request of Plaintiff for Production of Documents.
" "	3	Notice of Plaintiff to take Deposition of Albert W. Nemenz.
" "	4	Notice of Plaintiff to take Deposition of John M.McCall Jr.
" "		Magistrate Notice furnished to Attorney for Plaintiffs.
" "	5	Summons Issued. (cc and Magistrate Notice picked up by Attorney for Plaintiffs for Service pursuant to Local Rule 25). (Served: 4/15/80-See Paper 11)
" "	6.	EX PARTE Motion of Plaintiffs for document retention order Affidavit and proposed order. (c/s)
" "	7	Interrogatories (FIRST SET) (21) of Plaintiffs propounded to Defendant.

Apr. 15	8	Response of Defendant in Opposition to Ex Parte Motion of Plaintiffs for Document Retention Order (2 c/s)
Apr. 28	9	Reply of Plaintiffs to Response of Defendant in Opposition to Plaintiffs' Ex Parte Motion for Document Retention Order and Exhibit A. (2 c/s)
May 2	10	Notice of Defendant to take the Deposition of Plaintiff J. Nat Hamrick Jr. and Specification of Documents. (2 c/s)
May 5	11	Affidavit of Service.
May 5	12	Stipulation re: Documents with Approval of the Court (Kaufman, J.) (C/M-5/6/80-leh)
May 5	13	ANSWER AND Exhibit A.
June 4	14	Answers and objectives of Plaintiffs to Defendant's Request for Documents Attached to Notice of Deposition of J. Nat Hamrick, Jr. (2 c/s)

June 5	15	Answers and Objections of Defendant to Interrogatories (First Set) Propounded by Plaintiffs.
" "	16	Response of Defendant to Request of Plaintiffs for Production of Documents.
June 9	17	Scheduling Order (Kaufman J.) thereon. (c/m 6/10/80 leh)
June 16	18	Stipulation and Order (Young, J.) that Plaintiffs shall have to and including 10 days following the conclusion of the depositions of Mr. John McCall, Jr., Mr. Albert W. Nemenz and Mr. J.Nat Hamrick Jr., in which to file a motion to compel responses to Plaintiffs First Set of Interrogatories. (c/m-6/17/80-leh)
Aug. 12	19	Supplemental Answer of Plaintiffs' to Request of Defendant for Production of Documents Attached to Notice of Deposition of J. Nat Hamrick, Jr., and Attachments. (FILED SEPARATELY)

Aug. 13	20	Deposition of Plaintiff, J. Nat Hamrick, Jr., taken on behalf of Defendant on July 25,1980. (FILED SEPARATELY) (No Exhibit Received)
Aug. 25	21	Appearance of Robert A. Seefried, Esquire as Attorney for Plaintiffs and J.Nat Hamrick, Esquire, as of Counsel for the Plaintiffs.
Aug. 26	22	Memorandum (Kaufman,J.) requesting a Status Report re: Discovery Matters on or before September 5, 1980. (c/m-8/26/80-bw)
Sept. 1	23	Memorandum (Kaufman,J.) requesting Counsel to confer and to complete the attached Scheduling Order and return same to the Court on or before September 15, 1980. (c/m-9/3/80-leh)

Sept. 16	24	Letter/Notation (Kaufman, J) re: Scheduling Order and Filing of an Amended Complaint. (c/m-9/18/80-leh)
Sept. 18	25	Scheduling Order (Kaufman,J.) thereon. (c/m-9/18/80-leh)
Oct. 9	26	Motion of Plaintiffs for Leave to File and Amended Complaint. Memorandum, and Proposed Order. (2 c/s)
Oct. 13	27	Order (Kaufman,J.) Granting Motion of Plaintiff for Leave to File Amended Complaint unless Defendant shows cause in writing to the contrary, on or before October 24,1980. (c/m-10/14/80-leh)
Oct. 14	28	Letter dated October 13,1980 to Court from Counsel for Defendants advising they have no objection to the filing of the Amended Complaint and that they will be filing a response to the Amended Complaint on or before

Oct. 14	28	October 30, 1980 with APPROVAL of the Court (Kaufman,J.) thereon. (c/m-10/15/80-leh)
"	" 29	AMENDED COMPLAINT AND REQUEST FOR JURY TRIAL.
Oct. 21	30	Letter Dated October 20,1980 to Clerk from counsel for Defendant, Jno.McCall Coal Corp., advising they represent the added party defendant, Jno.McCall Coal Company,Inc., and have accepted service of the Amended Complaint on behalf of said added party defendant.
Oct. 29	31	Supplemental Answer. Plaintiff to Request of Defendants for Production of Documents.
Oct. 31	32	Deposition of Plaintiff,J. Nat Hamrick, Jr. taken on August 25,26,27, and 28,1980. (Four Volumes) (Filed Separately)
Oct. 31	32a	Deposition of John McCall, Taken on Sept. 15,1980, (filed Separately)

Oct. 31	33	Deposition of John McCall, taken on August 28 and 29, 1980 and September 3,1980 (THREE VOLUMES) (FILED SEPARATELY)
Oct. "	34	Deposition of Plaintiff, C.Dula Hawkins, taken on September 24 and 25,1980 (TWO VOLUMES) (FILED SEPARATELY)
Nov. 3	35	Motion of Defendants to Dismiss AMENDED Complaint, Memorandum, Exhibit A, and Request for Hearing. (c/s) and Exhibit B.
Nov. 4	36	Request (SECOND) of Plaintiff for Production of Documents and Exhibit A. (c/s)
Nov. "	37	Notice of Plaintiffs to take Deposition of Dr.James F.R.Sieper and R.E.Perkinson and Request for Production of Documents. (c/s)
Nov. "	38	Notice of Plaintiffs to take Deposition of Melanie Lawson and James J. Sidebotham (c/s)

Nov. 13	39	Notices (2) of Plaintiffs to take Depositions of the Chessie System and John S. Connor, Inc., on December 1, 1980, and Request for Production of Documents.
Nov. "	40	Notices (2) of Plaintiffs to take Depositions of Albert Knighton, John S. Connor, Inc. and Gordon Broadfoot, John S.Connor, Inc. on Decwmber 3, 1980.
Nov. 20	41	Motion and Order (Ramsey,J.) extending the time within which Plaintiff may file brief to and including November 25, 1980. (c/m 11/10/80 Cl)
Nov. 25	42	Memorandum of Plaintiff in opposition to Motion of Defendants to Dismiss Amended Complaint and Exhibits A and B. (c/s) and Additional Exhibit received 12/12/80. (c/s)
Dec. 3	43	Response and Objections of Defendants to Request (Second)

Dec.	3	43	of Plaintiff for Production of Documents and Affidavit of Albert W. Nemenz. (c/s)
"	8	44	Reply Memorandum of Defendants to Motion of said Defendants to Dismiss. (c/s)
"	15		Hearing on Motion of Defendants to Dismiss held before Ramsey,J.
"	15		Robert A. Seefried, Esquire moved and admitted PRO HAC VICE
"	15		Argued and Held Sub-curia.
1981			
Jan.	5	45	Interrogatories (10) of Defendants propounded to Plaintiffs.
"	"	46	Motion of Defendants for Stay of Discovery, Points and Authorities, and Proposed Order. (c/s)
"	"	47	Request of Defendants for Production of Documents.
"	12	48	Memorandum of Plaintiffs in Opposition to Motion of Defendants for Stay of Disovery (c/s)

Jan.	16	49	Order (Ramsey,J.) "Staying" Discovery pending ruling on Motion of Defendants to Dismiss. (C/M 1/16/81 Clk)
Feb.	5	50	Answer and Objection of Plaintiffs to Interrogatories propounded by Defendnats. (c/s)
"	"	51.	Response to Plaintiffs to Request of Defendants for Production of Documents. (c/s)
Apr.	20	52	Motion of Plaintiffs to Add Ana Maria Garcia de Villa, guardian for Maria Florencia Villa Aulet as party plaintiff and proposed Order. (c/s)
"	22	53	Motion of Defendants for Reconsideration of Order entered January 16, 1981 Exhibits A and B, and proposed Order. C/S
May	1	54	Reponse of Plaintiffs to Motion of Defendants for Reconsideration of Order entered January 16,1981. (c/s)
"	4	55	Supplemental Responses of Plaintiff to Defendants' First Set of Interrogatories. and Affidavit (Received 5/12/81) (c/s)

May	12	56	Motion and Order (Ramsey,J.) "STRIKING" Sally A. Regal, Esquire, as counsel for Plaintiffs. (C/M 5/12/81 Clk)
"	22	57	Supplemental Response of Plaintiffs to Interrogatories (FIRST SET) propounded by Defendants.
"	29	58	Order (Ramsey,J.) dated May 28, 1981, "GRANTING" in part, Motion of Defendant for Reconsideration of Order entered January 16, 1981 and that limited discovery be completed within 60 days from this date as therein more particularly set forth. (c/m 5-29-81 Clk)
June	3	59	Notice of Defendants to take Deposition of Plaintiffs and R. Petersen and R.Antonio, Request for Production of Documents, and Attachment. (c/s)
"	11	60	Motion of Defendants to Compel Answers to Interrogatories and Local Rule 34 Statement. (c/s)

June	23	61	Motion and Order (Ramsey,J.) extending the time within which Plaintiffs may file a respond to Motion of Defendants to Compel Answer to Interrogatories, to and including July 7, 1981. (C/M 6/24/81 Clk)
July	8	62	Opposition of Plaintiff to Motion of Defendant to Compel Answers to Interrogatories and Proposed Order. (c/s)
"	23	63	Motion and Order (Ramsey,J.) dated July 16, 1981, extending the time within which to complete discovery, to and including September 15,1981. (c/m 7-17-81 Clk)
"	"	64	Memorandum and Order (Ramsey J.) dated July 20,1981, "DENYING" Motion of Defendants to Compel Answer to Interrogatories No. 5, and "GRANTING" in part and "DENYING" in part to Compel Answer to Interrogatory No. 6. (c/m 7-22-81 Clk)

July 31	65	Order (Ramsey,J.) dated July 30,1981, "GRANTING" Motion of Plaintiffs to add Ana Maria Aulet Garcia DeVilla, guardian for Maria Florencia Villa Aulet, as party plaintiff (C/M 7/31/81 Clk)
" "	66	Request of Defendants, (dated July 28, 1981) to Plaintiff, J.Nat Hamrick for Production of Documents.
" "	67	Notices of Defendants, (dated July 30, 1981) to take Depositions of Ruben Antonia and Roland Petersen and Request for Production of Documents.
" "	68	Answers Hearing submitted by Ana Maria Aulet Garcia to an Argentina Judge, and Attachments.
Aug 21	69	Notice and Order (Jones,J) withdrawing Robert A. Seefried Seymour, Seefried & Hoffman Chartered as counsel for Plaintiff (C/M 8/25/81-mbm)
Sept.21	70	Motion and Order (Ramsey,J.)

Sept.	21	70	extending the time within which discovery, RE: Interest may be completed, and to and including November 2,1981. (c/m 9-18-81 Clk)
Nov	30	71	Appearance of J.Nat Hamrick Esquire, as co-counsel on behalf of Plaintiff.
"	"	72	Motion of Plaintiffs to Add PETERSON ENTERPRISES AND RUBEN ANTONIA, as Party Plaintiffs. (c/s)
Dec.	8	73	Response of Defendants to Motion of Plaintiffs to add Party Plaintiff (c/s)
"	15	74	Motion of Plaintiff to appoint Guardian and Proposed Order.(c/s)
1982			
Jan	13	75	Response of Defendants to Compel Authentication of Documents. (c/s)
"	"	76	Opposition of Defendants to Motion of Plaintiffs to Appoinc Guardian Ad Litem. (c/s)

Jan	14	77	Opposition of Plaintiffs to Motion of Defendants to Dismiss, and in Support of Motion to add Party Plaintiffs and Attachments. (c/s)
"	20	78	Reply of Defendants to Opposition of Plaintiffs to Motion of Defendants to Dismiss, and in support of Motion to add Party Plaintiffs. (c/S)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, and
J. NAT HAMRICK, JR.
Plaintiffs.

vs.

Civil Action
No.
R- 80- 774

JNO. McCALL COAL EXPORT CORP. and
JNO. McCALL COAL COMPANY, INC.
Defendants.

MOTION TO APPOINT GUARDIAN

Now comes J. Nat Hamrick, counsel for plaintiffs, and respectfully shows to the Court:

-1-

That Maria Florencia Villa de Aulet is an infant residing in Argentina and sole heir of Juan Carlos Villa.

-2 -

That this action was brought by C. Dula Hawkins and J. Nat Hamrick, Jr. , plaintiffs, against the defendants to recover damages for breech of contract as set forth in this complaint.

-3-

That the father of the minor, Maria Florencia Villa de Aulet, was one Juan Carlos Villa, who had a claim against the defendants identical to the claim of the named plaintiffs herein.

-4-

That one Juan Carlos Villa is deceased and Maria Florencia Villa de Aulet is his sole heir and is a minor residing in Buenos Aires, Argentina.

-5-

That the said Maria Florencia Villa de Aulet has no general guardian and has no way to proceed to ascert her claim as heir of her father, against the defendants herein except by guardian ad litem duly appointed by this Court to act for her.

-6-

That plaintiffs are now attempting to have a general guardian appointed for her to act in this matter in the courts of Argentina, the country of her residence.

That, however, this effort has not been completed due in part to the refusal of the defendants to authenticate a letter written by Jno. McCall to the end that said letter may be transmitted together with the pleadings to the courts of Argentina.

-7-

That, however, this court has directed that all persons having an interest in this litigation as plaintiffs be made parties plaintiff by December 15, 1981.

-8-

That counsel for the plaintiffs feels that it will be impossible to complete the proceedings before the Argentine court by that time.

and therefore counsel for the plaintiffs

respectfully moves this Court that C. Thomas Williamson, III, Esq. whose address is c/o Kramon & Graham, P.A., Sun Life Building, Charles Center, Baltimore, Maryland 21201, a competent and responsible person, a member of the bar of this Court and fully competent to understand and protect the rights of Maria Florencia Villa de Aulet should be appointed guardian ad litem for her to the end that he may intervene in this action as a party plaitniff. He has no interest adverse to those of Maria Florencia Villa de Aulet, is not connected in his business with the adverse party, and is of sufficient ability to answer to Maria Florencia VIlla de Aulet for any damages which may be sustained by negligence or misconduct of the said C. Thomas Williamson, III in the prosecution of said suit.

That said C. Thomas WIlliamson, III, Esq. is willing to act as guardian ad litem for Maria Florencia Villa de Aulet as appears by his consent attacheded hereto.

WHEREFOR plaintiffs move the Court for an order appointing C. Thomas Williamson, III, Esq. as guardian ad litem for the purpose of intervening in this action as a party plaintiff until such time as a general guardian can be appointed for her by the courts of Argentina.

This 15th dayof December, 1981.

/s/ J. Nat Hamrick
J. Nat Hamrick
Attorney for Petitioner
PO Drawer 470
Rutherfordton, NC 28139
(704) 287-3359

/s/ Andrew Jay Graham

Andrew Jay Graham - Attorney
for Petitioner
Sun Life Building
Charles Center
Baltimore, Maryaldn 21201

I, C. Thomas Williamson, III, am willing to act as guardian ad litem for Maria Florencia Villa de Aulet, the sole heir of one Juan Carlos Villa's estate and to protect her interest as a named plaintiff in the above action.

This 15th day of December, 1981.

/s/ C. Thomas Williamson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, et. al.,
Plaintiffs.

vs.

JNO. MCCALL COAL EXPORT CORP., et. al.,

Defendants.

MOTION TO COMPEL
R-80-774

NOW COME Plaintiffs through their counsel and respectfully show to the Court:

-1-

That they ahve filed motions and submitted orders to join all necessary parties to this actionwith the exception of the minor daughter of Commodore Villa.

-2-

That Plaintiffs' counsel has been advised that in order to join the minor daughter of Commodore Villa it is necessary that a letter written by Jno. McCall, signed by Jno. McCall, which is a party of and attached to the pleadings, be acknowledged by a Notary Public and authenticated by the Argentine Consul. Copy of said letter is attached and marked Exhibit A.

-3-

That Plaintiffs' counsel is advised that once hthis has been done and the authenticated pleadings in this case together

with the letter have been forwarded to the proper children's court inBuenos Aires, Argentina an order will be entered permitting the minor daughter to appear through her mother as a plaintiff in this action.

-4-

Defendants have declined to have Jno. McCall acknowledge his signature before a Notary Public so that said letter may be authenticated by the Argentine Consul and sent to the proper court in Argentine.

-5-

Plaintiffs feel that the position of the Defendants in this matter is inconsistent in that on the one hand that they insist she be made a party and on the other hand they refuse to take a simple step to authenticate the letter in order that she may be made a party.

-6-

In order to accomplish this desired end Plaintiffs feel that the Defendants should be compelled to authenticate the signature of Mr. Jno. McCall to the end that the permission of the Argentine Court can be obtained for the joinder of Commodore Villa's duaghter, or in the alternative that their motion to join the minor daughter of Commodore Villa be denied.

PLAINTIFF THEREFORE move the Court:

1. That an order be entered requiring Jno. McCall to acknowledge his signature before a Notary Public, or, in the alternative;

2. That defendants' motion to join the minor daughter of Commodore Villa be denied.

/s/ J. Nat Hamrick

J. Nat Hamrick
Attorney for Plaintiffs
PO Drawer 470
Rutherfordton, NC 28139
704-287-3359

/s/ Andrew Jay Graham
Andrew Jay Graham
Attorney for Plaintiffs-
Local Counsel
Sun Life Building, Charles
Center
Baltimore, Maryalnd 21201
301-752-6030

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No. 83-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C. DULA HAWKINS AND
J. NAT HAMRICK, JR.,

Petitioners,

v.

JNO. McCALL COAL EXPORT CORP. AND
JNO. McCALL COAL CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CALHOUN BOND,
MORTON A. SACKS,
THOMAS L. CROWE,
RAY R. FIDLER,
CABLE, McDANIEL, BOWIE
& BOND,
900 Blaustein Building,
Baltimore, Maryland 21201,
(301) 752-3650,
Counsel for Respondents.

QUESTION PRESENTED

Did the courts below abuse their discretion in dismissing and affirming dismissal of petitioners' action for petitioners' failure over a fifteen (15) month period to prosecute and obey a court order requiring joinder of an indispensable party, particularly when the district court had granted several extensions of time for compliance and petitioners misrepresented that the absent party had voluntarily joined?

PARTIES TO THE PROCEEDING

Respondents assert that the only proper petitioners before this Court are J. Nat Hamrick, Jr. and C. Dula Hawkins. While the Petition lists Ana Maria Aulet Garcia de Villa as a petitioner, she was never a party to the action in the district court. The district court, in

fact, dismissed the amended complaint for failure of petitioners J. Nat Hamrick, Jr. and C. Dula Hawkins to join her as a party-plaintiff.

Respondents are Jno. McCall Coal Company, Inc. and its wholly owned subsidiary, Jno. McCall Coal Export Corp.*

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*Corporations related to respondents whose identities must be disclosed pursuant to Supreme Court Rule 28.1 are McCall Industrial Lift Trucks, Inc., The Masteller Coal Company, McCall Marketing GmbH, McCall Fuels, Inc., Spring Ridge Coal Co., Eastern Mining Corp., South Atlantic Coal Co., Inc., Anthracite Land Corp., Elkins Valley Coal Co., Inc. and F&M Coal Co. Partnership.

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NO. 83-564

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

C. DULA HAWKINS and
J. NAT HAMRICK, JR.,

PETITIONERS,

vs.

JNO. McCALL COAL EXPORT CORP. and
JNO. McCALL COAL CO., INC.,

RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

On May 31, 1983, the United States Court of Appeals for the Fourth Circuit (Hall, Murnaghan and Sprouse, JJ.) issued a per curiam opinion affirming the district court's dismissal of petitioners' amended complaint. (R. App. A 1a).[1/] The court of appeals held that the district court properly dismissed the action under Rule 41(b), F.R.Civ.P.:

> the plaintiffs failed to comply with the court's order to effect joinder for a period of fifteen months. This failure provided the court with adequate grounds to dismiss the complaint under Federal Rule Civil Procedure 41(b). . . . The failure of a plaintiff to join a party

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[1/] References herein to "P. App." are to the Appendix accompanying the Petition. References to "R. App." are to the Appendices accompanying the Respondents' Brief in Opposition to the Petition.

> after the court rules that it is an indispensable party may result in dismissal of the plaintiffs' action for failure to prosecute under Rule 41(b).

(R. App. A 8a).

The United States District Court for the District of Maryland (Ramsey, J.) had dismissed petitioners' amended complaint for failure to join an indispensable party after having been ordered to do so. (R. App. B 11a). The district court noted with respect to petitioners' failure to join the party:

> plaintiffs have been given a reasonable opportunity to add her as a party, having been ordered to obtain joinder over fifteen months ago and having been given numerous extensions of time based on counsel's

> representations to the Court that joinder was imminent.

(R. App. B 19a).[2/]

THE RULE OF PROCEDURE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of juris-

---

[2/] This portion of the district court's opinion is set forth at pages 27 and 28 of petitioners' Appendix. However, in reproducing the opinion, petitioners have inexplicably omitted the important phrase "having been ordered to obtain joinder over fifteen months ago and". Because petitioners' reproductions of the opinions below contain so many typographical errors and omissions, respondents have reprinted both opinions in their Appendices.

diction, or improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

The courts below have well summarized the facts germane to petitioners' application for a writ of certiorari. Petitioners, C. Dula Hawkins and J. Nat Hamrick, Jr., filed their initial complaint against Jno. McCall Coal Export Corp. on April 1, 1980. On October 14, 1980, they amended their complaint to add Jno. McCall Coal Company, Inc. as a party-plaintiff. (The two McCall companies will, hereinafter, be referred to jointly as "McCall".)

Hawkins and Hamrick alleged that they had a contract with McCall which granted them an exclusive agency to sell McCall's coal to "SOMISA", a corporation

owned by the Argentine government. While petitioners never alleged they sold McCall's coal to SOMISA, they claimed entitlement to commissions on sales which McCall had made independently.[3/]

During discovery, Hamrick stated that in addition to himself and Hawkins, three other partners or co-venturers were members of the group with which McCall had allegedly contracted. The three additional partners, who represented an approximate sixty percent (60%) interest in the partnership but who were not named plaintiffs, were Petersen Enterprises (a Florida corporation), Ruben Antonio (an

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3/ McCall's position on the merits was that it had no contract with petitioners or, alternatively, that petitioners had abandoned the contract by nonperformance.

Argentine national), and Juan Carlos Villa (a former commodore in the Argentine Air Force and a former SOMISA executive). Villa, who was the only one of the five partners with any experience either in coal matters or with SOMISA, had died shortly before petitioners filed their initial complaint.

McCall moved, pursuant to Rules 12(b)(7) and 19, F.R.Civ.P., to dismiss the amended complaint for failure to join indispensable parties or, alternatively, for an order requiring joinder. (R. App. C 35a). Before the motion could be heard, Hamrick and Hawkins obtained assignments of rights in litigation from Petersen Enterprises and Ruben Antonio. At a hearing on the motion held on December 15, 1980, the district court ordered Hamrick and Hawkins to join Villa's successor in

interest or obtain an appropriate assignment of Villa's rights in the litigation.

On January 30, 1981, petitioners' original counsel, Robert A. Seefried, Esquire, wrote to Judge Ramsey. (R. App. D 40a). In the letter, Mr. Seefried stated that Hamrick had informed him Ruben Antonio would attempt to obtain the assignment from the Villa estate, but needed additional time. The district court extended the time through and including February 20, 1981. (R. App. E 44a). On February 20, 1981, Seefried again wrote to the court and stated: "Mr. Hamrick has informed me that the assignment has in fact been executed and has been mailed to him . . . ." (R. App. F 47a). Petitioners never filed any assignment from the Villa estate.

On April 17, 1981, petitioners moved for leave to add Ana Maria Aulet Garcia de Villa ("Sra. Villa") as a party-plaintiff. (P. App. 48). In their motion, petitioners alleged that Sra. Villa was Commodore Villa's widow and the guardian of their daughter, and that the daughter was the sole heir of Commodore Villa's estate. In addition, petitioners represented that Sra. Villa had appointed Mr. Seefried "to represent in this litigation whatever interests in the litigation the late Mr. Villa had." (P. App. 49). The authorization to which petitioners' motion apparently referred was a letter dated March 2, 1981. (R. App. G 48a). McCall's counsel did not oppose the motion. (P. App. 49). The district court granted petitioners' motion to add Sra. Villa by order dated July 30, 1981. (P. App. 49).

Sra. Villa, however, had not agreed to join the action as a party-plaintiff as petitioners had represented to the district court. McCall obtained from the Argentine court a duly authenticated copy of an "Answers Hearing" which it filed with the district court, together with a certified Spanish to English translation of the original. (R. App. H 50a). In the Answers Hearing, Sra. Villa informed the Argentine court that she had been contacted by Ruben Antonio; that she had refused to enter the case; that "in view of Mr. Ruben Antonio's insistence, . . . a draft of a model of authorization was prepared"; but that she had retained the original of the authorization. (R. App. H 54a-56a).

Promptly after this revelation and on August 14, 1981, Mr. Seefried with-

drew as petitioners' counsel. Thereafter, J. Nat Hamrick, Sr., Esquire, the father of petitioner J. Nat Hamrick, Jr., entered the case as lead counsel.

On December 1, 1981, Judge Ramsey wrote to counsel. (R. App. I 61a). In the letter, the court noted that during a scheduling conference held the previous month, it had "expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case." Judge Ramsey thereupon granted petitioners fifteen (15) days from the date of the letter to accomplish the necessary joinder. Twice thereafter the district court extended the deadline. (R. App. A 4a). During the period of additional delay, petitioners filed motions requesting the district court to appoint a Maryland attorney as guardian

ad litem for Commodore Villa's daughter (P. App. 75) and require a representative of McCall to authenticate a letter, which action petitioners claimed was necessary before the Argentine court would approve joinder of Sra. Villa. (P. App. 79).

On April 12, 1981, some fifteen (15) months after it had ordered joinder of the Villa interest, the district court ruled on all open motions and dismissed petitioners' amended complaint. (R. App. B 11a; P. App. 41).

The court held that Maryland law which provided the rule of decision in the case and Rule 17(c), F.R.Civ.P. did not permit appointment of a guardian ad litem where a general guardian (whom petitioners had represented Sra. Villa to be) existed. The district court similarly held that no representative of

McCall needed to authenticate the signature on the letter because petitioners could do so or, for that matter, the clerk of the court, inasmuch as McCall had incorporated the letter as an exhibit to its answer to petitioners' initial complaint and acknowledged its authenticity.[4/] The district court also denied petitioners' motion to add as parties-plaintiff Petersen Enterprises and Ruben Antonio, who had

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[4/] The conclusion was obviously correct. Petitioners later represented to the court of appeals that after argument on appeal, the Argentine Court had granted Sra. Villa permission to intervene in this suit (P. App. 2-3), notwithstanding that McCall never authenticated the signature on the letter. They repeat their contention before this Court, claiming that after argument at the court of appeals they "obtained approval from the Argentine Children's Court for Ms. Villa's appearance as guardian for her daughter in this action." (Petition at 19).

by then rescinded their assignments to petitioners, because dismissal for petitioners' failure to join the Villa interest rendered the motion moot.

The dismissal had two bases: (1) the court's conclusion that the successor to Commodore Villa's interest was an indispensable party whose joinder was not feasible because located in Argentina; and (2) the petitioners' disobedience of the court order requiring joinder for a period of fifteen (15) months. See page 3, supra.

Petitioners appealed the dismissal to the United States Court of Appeals for the Fourth Circuit.

The court of appeals heard oral argument on January 13, 1983. After argument, but prior to the court of appeals' decision on May 31, 1983, petitioners moved (1) for leave to file

a post-hearing brief; (2) to suspend the Federal Rules of Appellate Procedure to permit them to supplement the record on appeal (P. App. 1); and (3) to amend their motion to suspend the rules and further supplement the record. (P. App. 5). The documents petitioners sought to add to the record were letters from Sra. Villa to their counsel and papers from Argentine courts and officials. The court of appeals denied all of petitioners' post-argument motions. (P. App. 9).

On May 31, 1983, the court of appeals affirmed the decision of the district court. Specifically, it held that dismissal was proper for failure to prosecute and to comply with the district court's order requiring joinder. (R. App. A 1a). Although the court of appeals found that the district court's

dismissal pursuant to Rule 19 was improper (because of the district court's erroneous conclusion that it lacked personal jurisdiction over the Villa interest), it concluded that the petitioners' failure to comply with the district court's order to effect joinder provided an adequate ground to dismiss the amended complaint under Rule 41(b), F.R.Civ.P.

SUMMARY OF ARGUMENT

Petitioners disobeyed the district court's order to join an indispensable party for fifteen (15) months. During this period they falsely represented first that the absent party had assigned its interest to them and, later, had joined the litigation voluntarily. Under the circumstances, the district court did not abuse its discretion in dismissing petitioners' claim. No

action by the district court or the court of appeals warrants review on a writ of certiorari under the standards set forth in Supreme Court Rule 17.1.

ARGUMENT

In view of the presentation in the foregoing Statement of the Case, the McCall response to petitioners' contentions here may be limited. The actions of the district court and court of appeals below are unassailable. Petitioners' failure to join the Villa interest for the fifteen (15) month period following the district court's order to do so should alone compel dismissal. Because this non-feasance was compounded by misrepresentations -- first that the Villa estate had assigned its interest and secondly that Sra. Villa had agreed to participate in the case -- the district court had no choice

but to dismiss the action. As the court of appeals stated:

> The district court had more than ample reason to find a failure to prosecute under the facts of this case. In addition to the inordinate delay, the district court was misled by the assurance of plaintiffs' counsel that an assignment from Villa's estate had been procured and by the subsequent misrepresentation to the court that Mrs. Villa authorized counsel to represent the Villa interests in the case.

(R. App. A 9a-10a).

Petitioners' contention that the courts below not only erred, but that the errors were sufficiently grievous to justify this Court's issuance of a discretionary writ of certiorari, is totally without merit. The claimed conflicts with a decision of this Court and with decisions of other courts of appeals are simply non-existent. Moreover, there is absolutely no basis for

contending, as petitioners do, that the district court and court of appeals in their treatment of the case so far departed from the accepted and usual course of judicial proceedings so as to call for this Court's exercise of its supervisory power. In short, none of the considerations set forth by Supreme Court Rule 17.1 governing review on certiorari is even remotely met.

Petitioners assert that "[t]he decisions in this case are in direct conflict with the opinion in this court" in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). (Petition at 7). In Provident Tradesmens this Court held that an automobile owner whose participation in the suit would defeat diversity jurisdiction was not an indispensable party to a suit by the estate of the deceased driver

against the owner's insurer to establish that the deceased driver had operated the vehicle within the scope of the owner's permission.

The absent party in Provident Tradesmens was not a missing partner whose contractual rights as a joint obligee the plaintiff sought to enforce. Federal courts applying the partnership law of states like Maryland which have enacted the Uniform Partnership Act, have consistently held that because partners or co-venturers are joint obligees, all partners or co-venturers must join in bringing suit, and each is an indispensable party-plaintiff to a suit to enforce contract rights. Harrell & Sumner Contracting Co., Inc. v. Peabody Petersen Co., 546 F.2d 1227, 1228-29 (5th Cir. 1977); Bry-Man's, Inc. v. Stute, 312 F.2d 585, 586-87 (5th Cir.

1963); Purcel v. Wells, 236 F.2d 469, 471-72 (10th Cir. 1956); 3A Moore, Federal Practice, ¶19.11 at 19-229 (2d ed. 1982); see Gregory v. Stetson, 133 U.S. 579 (1890).

It is apparent, however, that petitioners are not citing Provident Tradesmens for the proposition that a joint obligee in a contractual action, such as the Villa interest, is not an indispensable party. Rather, the "direct conflict" petitioners perceive flows from Justice Harlan's observation that Rule 19(b), F.R.Civ.P. imposes an "equity and good conscience" test. Provident Tradesmens Bank & Trust Co. v. Patterson, supra, 390 U.S. at 116. Petitioners' reliance on Provident Tradesmens, therefore, comes down to nothing more than their assertion that dismissal in this case was "unfair." Of

course, in Provident Tradesmens there was no question of disobedience of a court order or misrepresentation to judicial officers, factors which the court of appeals found controlling here.

Assertions that the appellate court's decision in this case conflicts with opinions from other circuit courts of appeals are equally specious. Virtually all of the decisions cited involve district court dismissals pursuant to Rule 41(b), F.R.Civ.P., and petitioners rely upon statements or intimations that dismissal is a harsh measure to be tempered with discretion. McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976); Graves v. Kaiser Aluminum & Chemical Co., 528 F.2d 1360 (5th Cir. 1976) (per curiam); Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974); Dyotherm

Corp. v. Turbo Machine Co., 392 F.2d 146 (3d Cir. 1968); Durgin v. Graham, 372 F.2d 130 (5th Cir. 1967) (per curiam); Lyford v. Carter, 274 F.2d 815 (2d Cir. 1960) (per curiam); Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 262 F.2d 856 (2d Cir. 1959). Again, none of the cases petitioners cite involves the type of delay or misrepresentation which occurred before the district court.

The remaining decision cited by petitioners is Slade v. Louisiana Power & Light Co., 418 F.2d 125 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970), a decision which supports the lower courts' disposition here. In Slade, the Fifth Circuit held that in diversity cases, federal courts should apply the law of the state forum in deciding which guardian has capacity to

sue. Of course, in the instant case, the district court and court of appeals properly applied Maryland law in holding that the general guardian of Commodore Villa's daughter was the only person competent to represent her interests. Under Maryland law, Sra. Villa would be the natural guardian of her minor child. Art. 72A, Md. Code Ann. §1. Sra. Villa was, moreover, according to petitioners "the legal guardian of Mr. Villa's minor daughter." (P. App. 49). Where a general guardian exists, Maryland law will not normally countenance the appointment of a guardian ad litem, in the absence of a conflict of interest or other disqualifying factors. See generally Gradman v. Gradman, 182 Md. 293, 34 A.2d 433 (1943). This same policy is reflected in Rule 17(c), F.R.Civ.P. The district court's

departure from what it found to be the Maryland rule would have been particularly inappropriate here -- where the general guardian had refused to participate and petitioners, who requested appointment of a guardian ad litem, had misrepresented her position.

An examination of the record in this case confirms that the district court and court of appeals acted properly. Neither "so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision." S. Ct. R. 17.1.

The district court first ordered petitioners to join the Villa interest or obtain an appropriate assignment on December 15, 1980, affording them forty-five (45) days to do so. During

the fifteen (15) months between the district court's direction and dismissal on April 11, 1982, petitioners did not "merely" fail to comply with the order; rather, they misled the court by saying that an assignment had been obtained (R. App. F 46a) and that Sra. Villa was voluntarily joining the litigation. (P. App. 48). When the district court "expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case" at a November 24, 1981 status conference, but granted petitioners until December 16, 1981 to join the Villa interest (R. App. I 61a), they still failed to comply. Indeed, their response was two dilatory motions, the first to have a Maryland attorney appointed as guardian ad litem (P. App. 75) and the second to

compel McCall to authenticate a document, because they alleged McCall's authentication was necessary to obtain the Argentine court's approval for Sra. Villa to intervene. (P. App. 79). As just discussed, the first motion was improper. The frivolousness of the second is best demonstrated by petitioners' contention that after the case was argued in the court of appeals, they obtained approval from the Argentine court without any authentication of the letter by McCall. See page 13, n.4 supra.

This Court has ruled that a district court possesses inherent authority to dismiss an action for failure to prosecute, which may include failure to comply with a court order. Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). Link v. Wabash further

holds that the trial court may act sua sponte; that it should consider the entire progress of the litigation, and that the standard of review is abuse of discretion. Id. at 630 and 633. The actions of the lower courts were well within the limitations which this Court has imposed for dismissals for failure to prosecute and for disobedience of court orders.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1402

C. Dula Hawkins, J. Nat Hamrick, Jr., Ana Marie Aulet Garcia deVilla, guardian for Maria Florencia Villa Aulet,

Appellants,

v.

JNO McCall Coal Export Corporation, JNO McCall Coal Company, Inc.,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Argued: January 13, 1983 Decided: May 31, 1983

Before HALL, MURNAGHAN and SPROUSE, Circuit Judges.

J. Nat Hamrick (Hamrick & Hamrick; Andrew J. Graham, Kramon & Graham, P.A. on brief) for Appellants; Ray R. Fidler (Morton A. Sacks, Thomas L. Crowe, Cable, McDaniel, Bowie & Bond on brief) for Appellees.

PER CURIAM:

C. Dula Hawkins and J. Nat Hamrick, Jr. (the plaintiffs) appeal from the district court's dismissal of their contract action against JNO McCall Coal Export Corporation and JNO McCall Coal Company (McCall). The district court's dismissal erroneously was based on Federal Rule Civil Procedure 19(b). Since, however, the dismissal properly could have been grounded on Federal Rule Civil Procedure 41(b), we affirm.

The complaint below alleged an oral contract in which McCall promised to use the services of a five-person joint venture (which included the plaintiffs) to sell coal to a government-owned steelmaking corporation in Argentina. The complaint further alleged that McCall violated the contract and sold

coal directly to the Argentine company, failing to pay plaintiffs' [sic] their commissions. This appeal, however, involves procedural issues, rather than substantive contract issues.

The five members of the joint venture included the plaintiffs, Petersen Enterprises, Inc., Ruben Antonio and Juan Carlos Villa. Villa, an Argentine citizen, died prior to the commencement of this action and his sole heir was a minor daughter, Maria, who is also a citizen of Argentina. The plaintiffs did not refer to these other members in either their original or amended complaint. After depositions revealed their participation, however, McCall moved for a Rule 19 dismissal, asserting that all five members were necessary and indispensable parties.

McCall moved, in the alternative, for an order requiring plaintiffs to join the absent joint venturers. The plaintiffs thereafter secured assignments from Antonio and Petersen of their interests in the joint venture.

On December 15, 1980, the district court gave the plaintiffs 45 days either to secure an assignment from the Villa heir or to join her. The court subsequently granted two extensions of its order upon assurances from the plaintiffs that they would comply with it. The court granted the second extension after plaintiffs' counsel stated in a letter to the court that an assignment of the Villa interest had been executed and would be forthcoming. The plaintiff, however, never filed such an assignment.

On April 17, 1981, the plaintiffs moved to add Maria Villa's mother as a party plaintiff. The motion asserted that the mother "is the legal guardian of Mr. Villa's minor daughter. She has appointed the undersigned to represent in this litigation whatever interests in the litigation the late Mr. Villa had." The plaintiffs filed with this motion a copy of the alleged appointment, purportedly signed by Mrs. Villa. On Villa. On July 31, 1981, however, McCall filed authenticated documents from Argentina which revealed that (1) Villa's widow had not authorized anyone to represent the interests of the Villa estate in the litigation, and (2) such authorization required approval from the appropriate Argentine court. Subsequently, plaintiffs' then lead

counsel, Robert Seefried, withdrew as counsel and plaintiffs' current counsel, J. Nat Hamrick, Sr., assumed the role of lead counsel.

At a status conference held on November 24, 1981, the district court advised the plaintiffs that their failure to join the necessary parties[1] had caused undue delay. The court nevertheless allowed plaintiffs an additional fifteen days to effect appropriate joinder. The court twice extended this deadline. During that period, the plaintiffs moved

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[1] In addition to Villa's heir, these parties included Antonio and Petersen, who by November, 1981, had rescinded their assignments. Plaintiffs then moved the court to join Antonio and Petersen as party plaintiffs. The court denied this motion as moot in its dismissal order.

the court to appoint an associate in the law firm of plaintiffs' local counsel as guardian ad litem for Villa's heir, to act as a representative party plaintiff. The plaintiffs also filed a motion seeking to compel the president of McCall to authenticate a letter allegedly necessary to assert joinder of the representative of the Villa interest.

The district court denied these motions and dismissed the entire complaint on April 12, 1982. In its dismissal order, the court stated that the Villa heir was an indispensable party. It further found that her joinder was not feasible, principally because the court lacked in personam jurisdiction over her. The court then weighed the factors mandated by Rule

19(b) and in exercise of its discretion granted McCall's motion to dismiss.

We think the district court incorrectly assumed that it did not have in personam jurisdiction over the Villa heir. The Maryland long-arm statute provides the requisite basis for in personam jurisdiction under the facts of this case. Md. Cts. & Jud. Proc. Code Ann. §6-103(b)(1) (Rep. Vol. 1980). See also Md. R.P. 107 (a)(4) (Rep. Vol. 1977); Fed. R. Civ. P. 4(e), (i)(1).

Although, as we have indicated, joinder was feasible, the plaintiffs failed to comply with the court's order to effect joinder for a period of fifteen months. This failure provided the court with adequate grounds to dismiss the complaint under Federal Rule Civil Procedure 41(b). That rule

provides in pertinent part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The failure of a plaintiff to join a party after the court rules that it is an indispensable party may result in dismissal of the plaintiffs' action for failure to prosecute under Rule 41(b). See English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47-48 (5th Cir. 1972); Transit Casualty Co. v. Security Trust Co., 396 F.2d 803 (5th Cir. 1968). The district court had more than ample reason to find a failure to prosecute under the facts of this case. In addition to the inordinate delay, the district court was misled by the assurance of plaintiffs'

counsel that an assignment from Villa's estate had been procured and by the subsequent misrepresentation to the court that Mrs. Villa authorized counsel to represent the Villa interests in the case.

We have reviewed plaintiffs' other two assignments of error and find no merit in them. The judgment of the district court therefore is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ET AL., :
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Plaintiffs, :
:
v. : CIVIL ACTION NO.
: R-80-774
JNO. McCALL COAL EXPORT CORP., ET AL., :
:
Defendants :
:

: : o0o : :

MEMORANDUM AND ORDER

This suit arises out of an alleged breach of a verbal agreement by five members of a joint venture or partnership -- two of whom are plaintiffs, C. Dula Hawkins ("Hawkins") and J. Nat Hamrick, Jr. ("Hamrick") -- and defendants. The venture allegedly was in connection with certain proposed coal

transactions. Although the amended complaint contains three counts, the same transaction is common to each count. In November, 1980, defendants filed a motion to dismiss the amended complaint for failure to join necessary and indispensible parties, namely Petersen Enterprises, Inc. ("Petersen"), Ruben Antonio ("Antonio"), and the representative of the estate of one of the deceased venturers, Juan Carlos Villa ("Villa"). Plaintiffs purportedly secured assignments from Antonio and Petersen and at the hearing held on December 15, 1980, the Court reserved ruling and afforded plaintiffs a period of forty-five (45) days in which to secure an assignment from the successor to the Villa interest. This period was twice extended at plaintiffs' request,

the second extension coming after plaintiff Hamrick informed counsel that the assignment had in fact been executed and was in the mail. On April 20, 1981, a motion to add Villa's widow (Ana Maria Aultet [sic] Garcia) as a party plaintiff was filed, but on July 31, 1981, authenticated documents from Argentina were filed which revealed that (1) Villa's widow had not inherited his estate -- a minor daughter (Maria Florencia Villa de Aulet) -- being the apparent beneficiary, (2) Villa's widow had not given her authorization for anyone to represent the interests of the Villa estate in this litigation, and (3) judicial approval for any such authorization from the Argentine court would be required. Subsequently, plaintiffs' then lead counsel, Robert

Seefried, withdrew his appearance and that of plaintiffs' current counsel, J. Nat Hamrick, Sr., was entered.

In September and October, 1981, Antonio and Roland Petersen were deposed at which time they informed counsel for defendants that the assignments of their interests had been rescinded and they intended to join as parties plaintiff. At the status conference held on November 24, 1981, the Court expressed the view that plaintiffs' failure to accomplish joinder of the necessary parties had occasioned undue delay in this case. Plaintiffs were nevertheless allowed fifteen days to achieve the joinder they believed necessary. On November 30, 1981, a motion to join Petersen and Antonio as parties-plaintiff was filed. The Court indi-

cated that it would not rule on the motion for joinder until plaintiffs had accomplished the joinder of all necessary parties. At the request of counsel for plaintiffs, the fifteen day deadline for obtaining complete joinder was twice extended. As of this date plaintiffs have not moved to join the representative of the Villa estate as a party plaintiff. Plaintiffs have, however, filed other motions in its stead; which motions now have been fully briefed by plaintiffs and defendants. Currently open and ready for decision are the following motions:

1. Defendants' Motion to Dismiss Amended Complaint for Failure to Join Necessary and Indispensible Parties.

2. Plaintiffs' Motion to Add Additional Parties Plaintiff.

3. Plaintiffs' Motion to Appoint Guardian.

4. Plaintiffs' Motion to Compel Authentication of Document.

The Court rules pursuant to Local Rule 6 seeing no need for further argument.

The initial question is whether the representative of the Villa estate is an indispensible party under F.R.Civ.P. 19.[1/] The starting point of this inquiry is Rule 19(a) -- "Persons to be Joined if Feasible." Under that rule, the court must, as a threshold determination, decide whether joinder

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1/ Plaintiffs having filed a motion to join Petersen Enterprises, Inc. and Ruben Antonio as parties plaintiff, the only interest of plaintiffs' negotiating group unrepresented is that of the late Juan Carlos Villa.

would be desirable for a just adjudication of this action.

Without deciding the precise legal status of the plaintiffs' business group, it is clear that the five members of the group were engaged in a joint venture for profit, each to share equally in any and all commissions of the venture. In contract actions in federal court "(j)oint obligees .... usually have been held indispensible parties and their nonjoinder has led to a dismissal of the action." 7 Wright & Miller, Federal Practice and Procedure §1613 at p. 126 (1972). See, e.g., Harrell & Sumner Contracting Co. v. Peabody Petersen Co., 546 F.2d 1227 (5th Cir. 1977); Republic Realty Mortgage Corp. v. Eagson Corp., 68 F.R.D. 218 (E.D. Pa. 1975). Moreover, in their

brief in opposition to defendants' motion to dismiss, filed January 14, 1982, plaintiffs now appear to concede that each of the living members of the group and the representative of the Villa interest, are parties who should be joined to this lawsuit. It is clear, therefore, that joinder of each member of the plaintiffs' group or their successor in interest, is desirable in this case.

Under Rule 19(a), if a person who should be joined has not been joined and his joinder is feasible, the court shall order that he be made a party. Petersen and Antonio have moved to join as plaintiffs in this lawsuit, therefore an order by the Court that Petersen and Antonio be made parties in [sic] unnecessary. As to the representative of

the Villa estate, however, such an order would be appropriate if joinder is feasible.

It is apparent that joinder of Villa's successor in interest, his minor daughter, Maria Florencia Villa de Aulet ("Maria"), is not feasible. Maria currently resides in Argentina, beyond the process and jurisdiction of this Court. Moreover, plaintiffs have been given a reasonable opportunity to add her as a party, having been ordered to obtain joinder over fifteen months ago and having been given numerous extensions of time based on counsel's representations to the Court that joinder was imminent.

In an effort to make joinder of the Villa interest feasible, plaintiffs have moved to appoint an associate of their local counsel, C. Thomas Williamson,

III, as the guardian ad litem to act for Maria to the end that he may intervene in this action in a representative capacity as a party plaintiff. Plaintiffs argue that since the Court has the power to make a recalcitrant potential plaintiff an involuntary plaintiff, when that person is beyond the jurisdiction of the Court, it has the power to appoint a guardian ad litem for a non-resident minor who has a cause of action in this Court.

Plaintiffs' theory is fatally flawed in several respects. First, there has been no determination that if Villa were still alive, the Court would make him an involuntary plaintiff if he chose not to join this litigation. Under Rule 19(a), a recalcitrant plaintiff can only be made an involuntary

plaintiff "in a proper case." The typical application of this procedure has been to allow exclusive licensees of patents and copyrights to make the owner of the monopoly an involuntary plaintiff in infringement suits. Wright & Miller, supra at §1606. Although the involuntary plaintiff doctrine has been applied by some courts to join persons other than exclusive licensees of patents or copyrights, the Court is satisfied that the instant action does not present a proper case for its application. See Rosen v. Rex Amusement Co., 14 F.R.D. 75 (D.D.C. 1952). As the Court of Appeals for the Fifth Circuit noted in Eikel v. State Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973), "(t)he 'proper case' is meant to cover only those instances where the absent party has

either a duty to allow the plaintiff to use his name in the action or some sort of an obligation to join plaintiff in the action."

Second, plaintiffs' motion completely ignores the Court's lack of in personam jurisdiction over Maria and the concomitant lack of power to appoint a guardian ad litem to act for her in this lawsuit. See Tryforos v. Icarian Development Co., S.A., 518 F.2d 1258 (7th Cir. 1975), cert. denied, 423 U.S. 1091 (1976).

Third, under Maryland law, to which this Court looks under Rule 17(b) to determine the capacity of guardians to sue for minors, see Vroon v. Templin, 278 F.2d 345 (4th Cir. 1960), a guardian ad litem typically will not be appointed (in the absence of conflicting interest)

when a general guardian already exists. See generally Gradman v. Gradman, 182 Md. 293, 303 (1943). F.R.Civ.P. 17(c) similarly conditions the appointment of a guardian ad litem on the absence of a general guardian. Sra. Aulet Garcia de Villa, as the surviving parent, is Maria's general guardian under Maryland law. Md. Ann. Code, Art. 72A, §1. Moreover, in their motion to add an additional party as plaintiff filed on April 20, 1981, plaintiffs represented to the Court that Sra. Aulet Garcia de Villa had been appointed guardian of her daughter by an Argentine court. Plaintiffs' motion for appointment of a guardian ad litem will be denied.

In a further effort to make joinder of the Villa interest feasible, plaintiffs have moved for an order compelling

John McCall, Jr. to acknowledge his signature before a notary public. Plaintiffs argue that such acknowledgement and authentication by the Argentine Consul is required by a children's court in Buenos Aires, Argentina before an order by that court permitting the minor daughter to appear through her mother as a plaintiff in this action will be entered. Defendants concede the authenticity of the letter in question, but refuse to assume any burden regarding establishment of its authenticity.

Plaintiffs have not stated any reason why authentication by defendants is essential in this case. Specifically, they have not established why an authentication by the Clerk of the Court or by witnesses to the signing, options available to them since this

lawsuit was filed, is inadequate. In the absence of such a showing there is no reason why the court should obligate defendants to assist plaintiffs in structuring their lawsuit.

Notwithstanding the fact that the representative of the Villa estates is a party that cannot be feasibly joined, plaintiffs argue that this suit should be allowed to proceed under Rule 19(b):

> (b) Determination by Court whenever Joinder is not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensible. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the

> extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In discussing the first factor -- the extent to which a judgment entered in the person's absence might be prejudicial to him or those already parties -- and the second factor -- the extent to which prejudice can be lessened by protective provisions in the judgment -- plaintiffs propose the following: (1) plaintiffs will ask the Court to hold in trust one-fifth of any recovery for the benefit of the successor to the Villa interest and in the event the action does not result in a judgment favorable

to plaintiffs, the successor to the Villa interest will be protected from any risk or loss as a result of this action; and (2) neither the widow of Villa nor his minor daughter have any knowledge of these transactions and the persons having such knowledge are parties or have asked to be made parties.

Without commenting on the protection plaintiffs' position affords to the holder of the Villa interest, it is clear that plaintiffs' proposal completely overlooks the prejudice that might result to defendants. As Professors Wright and Miller have noted, the emphasis on prejudice entails

> both the need to protect absent persons from litigation that might adversely affect their interests in the subject matter of the action and the

> need to protect those who are parties from the threat of multiple actions, which would involve additional expense to the litigants and to the judicial system, and would increase the possibility of inconsistent determinations.

Wright & Miller, supra at §1608, p. 67. Similarly, in Potomac Electric Power Co. v. Babock & Wilcox Co., 54 F.R.D. 486, 492 (D. Md. 1972), in granting defendants' motion to dismiss for lack of joinder of indispensible parties, Judge Harvey observed that "there is at the present time a risk that the (absent parties) could re-litigate the issues prosecuted here, or at a very minimum, require the defendants to come into another court and prove that principles of res judicata or collateral estoppel did apply in any subsequent action." The same risks are present in this case,

yet plaintiffs' "solution" provides no adequate protection. Moreover, the representative of the Villa estate being beyond the jurisdictional reach of this Court, this is not a case where defendants would be in a position to bring in absent persons who could not be joined as original parties by means of defensive interpleader, or by using interpleader or asserting a counterclaim under Rule 13(h) that falls within the ancillary jurisdiction of the Court. Wright & Miller, supra at §1608, pp. 74-75; see B. L. Schrader, v. Anderson Lumber Co., 257 F.Supp. 794 (D. Md. 1966); MacBryde v. Burnett, 41 F.Supp. 661 (D. Md. 1941).

With respect to the third factor -- whether a judgment rendered in the person's absence will be adequate -- the

Court will assume, without deciding that any judgment rendered in the absence of the representative of the Villa estate would be adequate under the protective provisions proposed by plaintiffs.

As to the fourth factor -- whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder -- plaintiffs argue that if this case is dismissed they will have no adequate remedy anywhere for the recovery of damages against defendants, since service of defendants can only be obtained in the State of Maryland. Assuming plaintiffs' position is

correct,[2/] when a group of joint venturers of diverse nationalities attempt to enter a contract for the sale of products in international commerce, one of the assumed hazards associated in such a relationship is that an action against the party obligated to the joint venture may not be maintained without joinder of all interested parties. See Rosen v. Rex Amusement Co., supra, 14 F.R.D. at 76. Plaintiffs voluntarily entered into this alleged business transaction and they cannot be heard to complain that one of the consequences of

---

2/ The Court seriously doubts that service of companies shipping coal in interstate and international commerce, as plaintiffs allege, can only be obtained in Maryland. Furthermore, it is possible that plaintiffs' claims are cognizable in the courts of Argentina or some other forum.

this course of dealing works a harsh result on them.

In determining whether "in equity and good conscience" an action should proceed in the absence of a party who should but cannot be joined, the Supreme Court has commented that "[t]he decision whether to dismiss (i.e., the decision whether the person missing is 'indispensible') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interest." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968). Having weighed the Rule 19(b) factors and the other pragmatic considerations present in this case, the Court con-

cludes that it cannot in equity and good conscience allow this action to proceed among the parties before it. Defendants' motion to dismiss will be granted. Since the proposed joinder of Petersen and Antonio will not achieve the complete joinder required in this case, plaintiffs' motion to join Petersen and Antonio as parties plaintiff will be declared moot.

For the reasons stated herein, it is this 12th day of April, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion for appointment of a guardian ad litem is DENIED;

2. That plaintiffs' motion to compel authentication of a document is DENIED;

3. That defendants' motion to dismiss is GRANTED;

4. That plaintiffs' motion to add additional parties plaintiff is declared MOOT;

and

5. That the Clerk will mail copies of the Memorandum and Order to all counsel of record.

/s/Norman P. Ramsey
Norman P. Ramsey
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, and J. NAT HAMRICK, JR.	*	
Plaintiffs	*	
v.	*	CIVIL ACTION NO. R-80-774
JNO. McCALL COAL EXPORT CORP. and JNO. McCALL COAL CO., INC.,	*	
Defendants	*	

* * * * * * * * *

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES

The Defendants, Jno. McCall Coal Export Corp. and Jno. McCall Coal Co., Inc., (hereafter jointly referred to as "McCall"), by their counsel, invoking Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure, move to

dismiss the Amended Complaint filed herein for Plaintiffs' failure to join necessary and indispensable parties, and as cause therefore say:

1. As shown in the attached Memorandum In Support of Defendants' Motion To Dismiss Amended Complaint For Failure To Join Necessary and Indispensable Parties, Defendants have taken the depositions of each of the Plaintiffs in this case and their testimony has disclosed that such Plaintiffs comprise only two of a five member partnership or joint venture which dealt with the Defendants in connection with the alleged contract sued upon. The deposition testimony of the Plaintiffs has also revealed that each of the five members of the partnership or joint venture (hereafter the "Hamrick Group")

agreed to share equally in 20% shares (with one minor exception not here relevant) any and all proceeds obtained by the Hamrick Group from its transactions with McCall. Accordingly, assuming arguendo that McCall has any obligation whatsoever arising from the transactions which are the subject of the Amended Complaint, that obligation would necessarily run to each of the five members of the Hamrick Group as joint obligees and not merely to the two members of such Group who have brought suit.

2. The three members of the Hamrick Group who have not but should have joined as parties plaintiff are Roland L. Petersen of Orlando, Florida, Ruben Antonio of Buenos Aires, Argentina and the personal representative of the

estate of Juan Carlos Villa, late of Buenos Aires, Argentina, who died in 1978.

3. If the Amended Complaint is not dismissed outright for failure of the absent partners or joint venturers to have joined as plaintiffs herein, which Defendants submit would be appropriate, then it is alternatively submitted that Plaintiffs should be ordered to secure the joinder of their absent partners as parties plaintiff, so that all persons who are interested in the subject matter of this action and whose rights and liabilities, if any, will be materially affected by its determination will be before the Court. If joinder of the three absent members of the Hamrick Group is not thereafter perfected in

accordance with such Order, the Amended Complaint should then be dismissed.

Respectfully submitted,

CABLE, McDANIEL, BOWIE & BOND

By /s/Morton A. Sacks
Morton A. Sacks

/s/Thomas L. Crowe
Thomas L. Crowe
900 Blaustein Building
One North Charles Street
Baltimore, Maryland 21201
(301) 752-3650

Attorneys for Defendants

APPENDIX D

Law Offices
SEYMOUR & DUDLEY
Chartered
1901 L Street, Northwest
Washington, D.C. 20036

January 30, 1981

The Honorable Norman P. Ramsey
United States District Judge
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: C. D. Hawkins, et al. v. Jno. McCall Coal Export Corp., et al.
Civil Action No. R-80-774

Dear Judge Ramsey:

At the hearing on December 15, 1980, concerning defendants' motion to dismiss the amended complaint filed in this action, Your Honor graciously granted plaintiffs an opportunity to secure an assignment to them of the claims that the estate of Juan Carlos

Villa may have against defendants arising out of the events underlying the lawsuit. My client, J. Nat Hamrick, Jr., has informed me that he has not been able to reach Mr. Ruben Antonio of Buenos Aires, Argentina, to assist in this regard. Apparently, Mr. Antonio has not yet returned to Buenos Aires from an extended trip to several European countries and Paraguay, although Mr. Hamrick understands that Mr. Antonio will be home around February 1.

Accordingly, plaintiffs respectfully request the indulgence of the Court and seek additional time to

attempt to secure the assignment to plaintiffs of the estate's interests in this litigation. Mr. Hamrick believes that if he is able to reach Mr. Antonio, the matter could be resolved within the next two weeks. Inasmuch as Your Honor has granted a stay of general discovery in this litigation pending Your Honor's decision on defendants' motion to dismiss, I see no prejudice to defendants in permitting plaintiffs additional time within which to pursue this matter.

I will, of course, keep Your Honor fully apprised of any developments in this regard as they occur.

Respectfully,

/s/Robert A. Seefried

Robert A. Seefried
Counsel for Plaintiffs

RAS/kar

cc: Morton A. Sacks
Counsel for Defendants

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
UNITED STATES COURTHOUSE
101 West Lombard Street
Baltimore, Maryland 21201

NORMAN P. RAMSEY
United States District Judge

February 3, 1981

Robert A. Seefried, Esquire
1901 L Street, N.W.
Washington, D. C. 20036

Re: Hawkins, et al. v. Jno. McCall Coal Export, et al. Civil Action No. R-80-774

Dear Mr. Seefried:

I am in receipt of your letter of January 30, 1981, in which you request an extension of time within which to secure an assignment from the estate of Juan Carlos Villa. Based on your assurances that the matter will take approximately two weeks to resolve once

Mr. Antonio can be contacted, I am hereby extending the time within which the assignment must be secured to the close of business on February 20, 1981.

Very truly yours,

/s/Norman P. Ramsey

Norman P. Ramsey
United States
District Judge

NPR:dbl
cc: Morton A. Sacks, Esquire

APPENDIX F

Law Offices
SEYMOUR & DUDLEY
Chartered
1901 L Street, Northwest
Washington, D.C. 20036

February 20, 1981

The Honorable Norman P. Ramsey
United States District Judge
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: C. D. Hawkins, et al. v. Jno. McCall Coal Export Corp., et al. Civil Action No. R-80-774

Dear Judge Ramsey:

This is in response to Your Honor's letter dated February 3, 1981, in which you extended the time within which plaintiffs were to secure an assignment of claims from the estate of Juan Carlos Villa. I have been in contact with my client, Mr. Hamrick, Jr., the last two

weeks and had fully expected to have the assignment filed with the Court as of this date.

Mr. Hamrick has informed me that the assignment has in fact been executed and has been mailed to him, but apparently because of delays in the mail delivery he has not yet received the assignment from Argentina. As soon as he receives the assignment he will special deliver it to me and I will have it filed with the Court. Accordingly, I must respectfully request a brief extension of time within which to conclude this matter.

Respectfully,

/s/Robert A. Seefried

Robert A. Seefried

RAS/kar
cc: Morton A. Sacks

APPENDIX G

Date: Buenos Aires,
marzo 2 de 1981.

Mr. J. Nat Hamrick, Sr.
Hamrick and Hamrick
Attorney's at Law
Po. O. Drawer 470
Rutherfordton, North Carolina 28139
U. S. A.

Dear Mr. Hamrick:

This is to appoint you and the law firm, Seymour & Dudley to represent the estate of Juan Carlos Villa, in the litigation you now have pending against Jno. McCall Coal Company in the United States District Court of Maryland.

I understand that the estate will not be responsible for any attorney's fees, unless there is a recovery in this action and from said recovery, the estate would pay its' proportionate share of such a fee.

Regards.

/s/Aulet Garcia
Ana María Aulet García de Villa

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS	*	
J. NAT HAMRICK, JR.	*	
and	*	
ANA MARIA AULET GARCIA de VILLA	*	CIVIL ACTION NO. R-80-774
Plaintiffs	*	
v.	*	
JNO. McCALL COAL EXPORT CORP.	*	
and	*	
JNO. McCALL COAL CO., INC.	*	
Defendants	*	

REQUEST TO FILE

Mr. Clerk:

Please file the attached:

1. Copy of "Answers Hearing" submitted by Ana Maria Aulet Garcia to

an Argentine Judge with responsibility for the Estate Proceedings concerning the late Juan Carlos Villa, which copy of the "Answers Hearing" is in the Spanish language, certified by an Argentine Notary and, in turn, certified by a Vice Consul of the United States of America; and

2. A translation of the aforementioned "Answers Hearing" from Spanish to the English language, which translation is certified, under seal, by an Argentine translator and, in turn,

certified by a Vice Consul of the United States of America.

Respectfully submitted,

CABLE, McDANIEL, BOWIE & BOND

By /s/Morton A. Sacks (tlc)
Morton A. Sacks

/s/Thomas L. Crowe
Thomas L. Crowe
One North Charles Street
Blaustein Building
Baltimore, Maryland 21201
(301) 752-3650

Attorneys for Defendants

ANSWERS HEARING

HONORABLE JUDGE:

ANA MARIA AULET GARCIA, Registry N° 11918, Volume 25 Folio 243, in her capacity as mother of the minor MARIA FLORENCIA VILLA, with legal domicile located at Viamonte 2040, 5° "B", in the proceedings entitled: VILLA JUAN CARLOS/ON ESTATE PROCEEDINGS, informs Your Honor as follows:

1. - That in due time and form I proceed to answer the notification conferred, for which purpose I present the following statements:

2. - That in order to clarify the presumed authorization or mandate referred to in Item 1 of the writ appearing at folio 248, by this present I state that same was never agreed in an authentic manner.

In this connection I wish to inform that I was interviewed by Mr. Ruben Antonio, who stated he had been a personal friend of my deceased husband, and who likewise stated that he had to discuss a matter related to the interests of the minor Maria Florencia Villa.

Once said interview was effected, he informed me of the possible existence of an eventual litigious credit for an amount which he could not establish against a firm of the United States of America, not being able to produce the corresponding documents.

He only stated that the beneficiaries of the above mentioned credit would be Messrs. C. Dula Haekins [sic], Nat Hambrick [sic], Jr., Roland I. Petersen, Ruben Antonio and the Estate

of Juan Carlos Villa, my authorization being necessary in accordance with that provided for by the United States laws.

Having consulted my attorney at law and Mr. Ruben Antonio, he was informed that prior to the granting of an authorization the intervention of the Honorable Judge in charge of the estate proceedings is indispensable as well as the presentation of all the elements evidencing the authenticity of the credit.

I also informed him of my uneasiness regarding the eventual costs to be paid in the event the action is not accepted.

Nevertheless, in view of Mr. Ruben Antonio's insistence, as it was a case of a joint action, a draft of a model of authorization was prepared,

the original of which is in my possession and is attached to this act, that would be submitted for its final presentation with the authorization of the Court provided Mr. Ruben Antonio submitted all the elements mentioned above and through which his claim would be feasible in the present proceedings.

As no elements were submitted nor any news received from the attorneys mentioned in the documents attached by the appearer, to which is added: 1st) that I had no knowledge of my husband's business; 2nd) that I never had knowledge of the present negotiation; 3rd) that I had never met Mr. Ruben Antonio and considered it contrary to law and lacking seriousness to effect any kind of presentation in these proceedings.

Having fulfilled that requested by Minors Adviser I am at the disposal of Your Honor and of the above mentioned Official in order to submit any clarification in these proceedings.

4. - Taking into consideration that the appearer could assume the capacity as interested party and contrary to the discussion of the presumed litigious credit, I consider that it would not be advisable that the answer to the writ be known by same, as same would be in an advantageous position on knowing the situation of the eventual future counterpart.

In accordance with the foregoing statements, I request that this writ be reserved by the Secretariat, as same is submitted for

the information of Your Honor and of the Minors Adviser.

5. - Taking into consideration that in the proceedings there still exists a presentation not corresponding to the decedent's heirs of a litigious nature, I request Your Honor a rigorous reserve on the proceedings, in the sense that same be kept in the safe of the Court and that same may be only verified by the parties and their attorneys at law.

6. In accordance with the foregoing statements, I request Your Honor:

1. To be considered in time and form as answered the conferred notification and the requested certification as rejected.

2. The intimation requested in Item 3 be effected.
3. Ordain the reserve of the present writ.
4. Dispose the reserve of the present writ in the safe of the Court and its examination exclusively by the parties and their respective attorneys at law.

To act accordingly

SHALL BE JUSTICE

I, CARLOS J. CARPENTER, a Public Translator in the Argentine Republic, duly admitted and sworn, residing and practising in the City of Buenos Aires, do hereby certify the foregoing to be a true and accurate translation into English of the document

in the Spanish language hereunto attached.

IN FAITH AND TESTIMONY WHEREOF, I have hereunto set my hand and seal at Buenos Aires, this 17th day of July 1981.

/s/Carlos J. Carpenter

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
UNITED STATES COURTHOUSE
101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201

NORMAN P. RAMSEY
UNITED STATES DISTRICT JUDGE

December 1, 1981

Andrew Jay Graham, Esquire
Sun Life Building
Charles Center
Baltimore, Maryland 21201

J. Nat Hamrick, Sr., Esquire
P.O. Drawer 470
Rutherfordton, North Carolina 28139

Morton A. Sacks, Esquire
Thomas L. Crowe, Esquire
One North Charles Street
Baltimore, Maryland 21201

Re: C. Dula Hawkins, et al. v.
Jno. McCall Coal Export Corp.,
et al. - Civil Action No.
R-80-774

Dear Counsel:

At the status conference held on November 24, 1981, in the above-captioned case and attended by

Andrew Graham for plaintiffs and Morton Sacks for defendants, the Court expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case. Nearly one year ago a hearing was held on defendants' motion to dismiss the amended complaint for failure to join necessary and indispensible parties. At that time the Court withheld ruling on defendants' motion, opting instead to allow plaintiffs the opportunity to secure assignments from or joinder of necessary parties. The Court has twice extended the time by which plaintiffs were to have cured any necessary party defects. Furthermore, the time for

completing discovery concerning asignments of interest, having twice been extended on plaintiffs' motions, ended on November 2, 1981.

As I indicated to counsel at the conference, I do not intend to allow this already protracted litigation to continue on its present course. Plaintiffs, therefore, shall have fifteen days from this date to accomplish the joinder they believe necessary in this case and file the appropriate papers with the Clerk. At the end of that time if joinder has not

been obtained I will rule promptly on defendants' motion to dismiss.

Very truly yours,

/s/Norman P. Ramsey

Norman P. Ramsey
United States District Judge

NPR:dbl

P.S. The Court has received this date copies of plaintiffs' motion to add Petersen Enterprises, Inc., and Ruben Antonia [sic] as parties plaintiff.